

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

UNITED STATES OF AMERICA,) AU:10-CR-00297(1)-LY
)
Plaintiff,)
)
VS.) AUSTIN, TEXAS
)
DAVID ANDREW DIEHL,)
)
Defendant.) DECEMBER 21, 2010

TRANSCRIPT OF DOCKET CALL AND PRETRIAL CONFERENCE
BEFORE THE HONORABLE LEE YEAKEL

APPEARANCES:

FOR THE PLAINTIFF: MATTHEW B. DEVLIN
 ASSISTANT UNITED STATES ATTORNEY
 816 CONGRESS AVENUE, SUITE 1000
 AUSTIN, TEXAS 78701

FOR THE DEFENDANT: STEPHEN M. ORR
 ORR & OLAVSON
 804 RIO GRANDE
 AUSTIN, TEXAS 78701

COURT REPORTER: ARLINDA RODRIGUEZ, CSR
 200 WEST 8TH STREET
 AUSTIN, TEXAS 78701
 (512) 916-5143

EXAMINATION INDEX

SEAN MULLEN	
DIRECT BY MR. DEVLIN	33
CROSS BY MR. ORR	54
REDIRECT BY MR. DEVLIN	64

Proceedings recorded by computerized stenography, transcript
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08:58:09 1 (Open Court)

08:59:52 2 THE COURT: We're here this morning on *United States*
08:59:59 3 *v. Diehl*, Cause Number 10-CR-297, set this morning for docket
09:00:02 4 call and pretrial motions. This is a case that is set for jury
09:00:07 5 selection and trial on January the 11th, 2011. I'll hear
09:00:12 6 announcements from the parties.

09:00:13 7 MR. DEVLIN: Matthew Devlin for the United States.

09:00:17 8 MR. ORR: Stephen Orr for Mr. Diehl, Your Honor.

09:00:19 9 THE COURT: And we've got numerous motions scheduled
09:00:22 10 this morning. Do any of them require evidence?

09:00:24 11 MR. DEVLIN: I believe that only one of them will,
09:00:27 12 Judge, and we can take that in whatever order you want. And I
09:00:30 13 believe -- and Mr. Orr can confirm it -- there is a motion to
09:00:34 14 suppress statements that were made by the defendant subsequent
09:00:38 15 to his arrest. We will have -- we plan on presenting evidence
09:00:42 16 on that motion and then argument. I think all the other
09:00:45 17 motions can be disposed of through the pleadings submitted by
09:00:48 18 the parties.

09:00:49 19 THE COURT: All right. Well, let me run through them
09:00:53 20 in the order I have them. The motions for discovery and
09:00:56 21 inspection, Mr. Devlin, have you provided and, Mr. Orr, have
09:01:00 22 you received all of what the defense is entitled to in this
09:01:04 23 case?

09:01:04 24 MR. ORR: Your Honor, I believe I have received not
09:01:07 25 only what the defense is entitled to but probably more than

09:01:09 1 what the defense is entitled to under the rules.

09:01:12 2 MR. DEVLIN: Yes, sir. We've had absolutely no
09:01:14 3 problems at all with discovery.

09:01:15 4 THE COURT: All right. That will just be granted so
09:01:19 5 we have a record on it.

09:01:20 6 Motion for notice of intent to use evidence under
09:01:23 7 12(b) 4.

09:01:24 8 MR. DEVLIN: That's been provided, Judge.

09:01:26 9 THE COURT: All right. Then that is of course
09:01:28 10 granted also.

09:01:29 11 Now, the motion in limine, Mr. Orr, what are you
09:01:37 12 after here?

09:01:38 13 MR. DEVLIN: Which one are you talking about, Judge?

09:01:40 14 MR. ORR: Number 24, Your Honor?

09:01:42 15 THE COURT: Twenty-four, yes.

09:01:44 16 MR. ORR: I think that's our -- 24. I believe it's
09:01:49 17 another -- as far as extraneous offenses, Your Honor, to
09:01:53 18 prevent the admission of those.

09:01:57 19 THE COURT: Well, as motion in limine, that will be
09:02:00 20 granted. Mr. Devlin, all that does to you is, if you have any
09:02:04 21 other offenses, you just have to approach the bench --

09:02:07 22 MR. DEVLIN: Yes, sir.

09:02:07 23 THE COURT: -- and let me know why those have become
09:02:10 24 relevant or needed at that point. I'll take that up outside
09:02:14 25 the presence of the jury.

09:02:15 1 MR. DEVLIN: Will do.

09:02:16 2 THE COURT: Now, we've got the motion to suppress
09:02:19 3 search and seizure of phone and computer hard drives. Is that
09:02:24 4 one you'll take up on argument, or will you need evidence on
09:02:28 5 that?

09:02:28 6 MR. DEVLIN: Judge, I have represented our -- I did
09:02:30 7 file a response to that, and I've represented that we do not
09:02:34 8 plan to introduce any evidence from those searches and seizures
09:02:38 9 in our case in chief. Since even if the evidence were
09:02:43 10 suppressible, and we've -- I've made argument that it was not.
09:02:47 11 But even if it were, it could come in on rebuttal or
09:02:50 12 cross-examination of the defendant. So it -- hopefully, that
09:02:55 13 will resolve the motion at that point.

09:02:57 14 So even if you were to determine that, in the worst
09:02:59 15 case, that they were suppressible, we could still bring them in
09:03:03 16 for those limited purposes. So I'm representing to the Court
09:03:06 17 and I've represented to Mr. Orr we're not planning to introduce
09:03:09 18 any of that in our case in chief.

09:03:12 19 THE COURT: Mr. Orr?

09:03:13 20 MR. ORR: I'm sure that if that changes, Mr. Devlin
09:03:16 21 will inform us.

09:03:17 22 MR. DEVLIN: Absolutely.

09:03:18 23 THE COURT: Well, what I will do is grant it as a
09:03:20 24 motion in limine --

09:03:21 25 MR. ORR: Yes, sir, Your Honor.

09:03:22 1 THE COURT: -- at this point and we'll withhold the
09:03:24 2 ruling as a motion to suppress and won't take up the issue of
09:03:28 3 whether it's suppressible.

09:03:29 4 MR. DEVLIN: Very good.

09:03:30 5 THE COURT: And, Mr. Devlin, if you seek to introduce
09:03:33 6 it, approach the bench and we'll deal with it as a motion to
09:03:36 7 suppress at that time Mr. Orr wants to urge that.

09:03:39 8 MR. DEVLIN: Yes, sir.

09:03:40 9 THE COURT: Now, number 33, the motion to suppress
09:03:43 10 statements, we're going to hear evidence on; is that correct?

09:03:46 11 MR. DEVLIN: Yes.

09:03:46 12 THE COURT: All right. Documents number 44 and 57,
09:03:54 13 which is the motion for bill of particulars and the amended
09:03:59 14 motion for bill of particulars, that motion has been superseded
09:04:03 15 by the amended motion. So I will dismiss the motion for bill
09:04:08 16 of particulars number 44.

09:04:11 17 Now, the first amended motion for bill of
09:04:14 18 particulars, number 57, Mr. Orr, you argue that the indictment
09:04:20 19 tracked the statute with bare assertions and that the defendant
09:04:23 20 cannot defend himself.

09:04:26 21 MR. ORR: Yes, sir.

09:04:27 22 THE COURT: I didn't have a whole lot of problem
09:04:29 23 figuring it out when I read it.

09:04:31 24 MR. ORR: That's why you're the Judge, and I'm still
09:04:33 25 down here in the pits as a mere lawyer.

09:04:35 1 THE COURT: Tell me what the problem is. What can
09:04:38 2 you not defend?

09:04:40 3 MR. ORR: Well, we have vague terminology so far as
09:04:45 4 alleged victims, Your Honor. Then we have vague terminology so
09:04:50 5 far as the acts depicted. It may say something like sexual
09:04:54 6 intercourse. Then the problem -- the problem becomes one of
09:04:58 7 differentiating between counts. The visual depictions are not
09:05:03 8 described -- are not depicted in enough detail that the defense
09:05:09 9 can determine where one video, for instance, begins or ends and
09:05:15 10 another begins. The indictment is not really adequate to allow
09:05:21 11 a defense of double jeopardy or multiplicity or duplicity so
09:05:27 12 far as the indictment is concerned.

09:05:29 13 The details are, I think, it's -- are exceedingly
09:05:36 14 vague, Your Honor. For instance, in many -- many counts filed
09:05:39 15 in various cases, a date will be alleged or a serial number of
09:05:43 16 a firearm will be given or the type of drug involved will be
09:05:47 17 given. But here the indictment does not really give notice.
09:05:51 18 And it's more than -- it's not enough, in my opinion, to say,
09:05:55 19 Well, we've been allowed to watch the videos. Mr. Diehl and
09:06:01 20 myself were allowed to watch what are supposedly the videos for
09:06:05 21 the various counts.

09:06:07 22 But what you have here is a problem where later on,
09:06:10 23 years from now or on appeal, we can't really tell which video
09:06:14 24 goes with which count. It would be not too difficult to
09:06:18 25 substitute one video for another video under these counts.

09:06:24 1 Many of the videos would be interchangeable under the language
09:06:28 2 in these counts.

09:06:29 3 THE COURT: Mr. Devlin?

09:06:30 4 MR. DEVLIN: Judge, first of all, I did file a
09:06:32 5 response to Document Number 46 back in September.

09:06:34 6 THE COURT: You did.

09:06:35 7 MR. DEVLIN: And since I believe that the motion is
09:06:37 8 substantially the same, I would like to carry that over to a
09:06:40 9 response to the amended motion. I think we've gone beyond what
09:06:43 10 we're supposed to do in the second superseding indictment.
09:06:46 11 We've endeavored to describe the videos. First of all, in the
09:06:52 12 language of the statute, we've used -- the charges track the
09:06:57 13 language of 2251(a). We've then gone on to lay out the
09:07:02 14 video -- the visual depictions by describing generally what
09:07:06 15 they depict, by describing the length -- the approximate length
09:07:11 16 of each visual depiction. And as Mr. Orr alluded to, we've had
09:07:16 17 one session -- two sessions with the defendant and Mr. Orr and
09:07:20 18 a couple of other sessions with just Mr. Orr to point out
09:07:24 19 exactly which videos are set forth in each of the counts.

09:07:30 20 I don't see how any further description of those
09:07:33 21 videos is going to be of any use without actually almost
09:07:38 22 including a copy of the video in the indictment, which we don't
09:07:41 23 want to do, of course.

09:07:42 24 So we've identified -- we've identified the victims
09:07:46 25 by Jane Doe 1, 2, 3 and John Doe. We have related to Mr. Orr

09:07:51 1 and the defendant who those are -- who those people are and
09:07:54 2 their actual names. And we've done our very best to lay out
09:07:58 3 exactly what should be -- what the charge -- what each charge
09:08:03 4 and which visual depiction those portray. So I think that
09:08:07 5 based on my response to the bill of particulars, that we've
09:08:10 6 done more than we have to and also the fact that we've tracked
09:08:14 7 the language of the statute. I believe that this is sufficient
09:08:16 8 to notify him and to protect him in the future from being
09:08:19 9 prosecuted for these offenses a second time.

09:08:22 10 THE COURT: Mr. Devlin, have you provided Mr. Orr and
09:08:26 11 the defendant with a copy of every video you seek to introduce
09:08:29 12 into evidence?

09:08:30 13 MR. ORR: We have not provided them with a copy,
09:08:32 14 Judge, because they're child pornography. However, we have sat
09:08:35 15 down -- pursuant to a court order, we have sat down with both
09:08:37 16 him and the defendant and run through each video that's subject
09:08:41 17 to each count.

09:08:42 18 THE COURT: You are not going to seek to introduce or
09:08:44 19 present to the jury any videos which have not been previously
09:08:48 20 displayed to the defendant and his lawyer; is that correct?

09:08:53 21 MR. ORR: As far as child porn videos, that is
09:08:55 22 correct. We have given him a copy of another video that we may
09:08:58 23 introduce that is not child porn. So he already has that.
09:09:01 24 But, no, not a copy of anything else that --

09:09:03 25 THE COURT: You're not going to seek to introduce

09:09:05 1 anything that's germane to this indictment that you have not
09:09:09 2 previously provided the defendant access to?

09:09:11 3 MR. DEVLIN: Oh, no, sir.

09:09:12 4 THE COURT: Mr. Orr, are you aware of anything you
09:09:15 5 think they're going to seek to introduce that you have not
09:09:18 6 previously seen or had an opportunity to review?

09:09:21 7 MR. ORR: No, Your Honor. But Mr. Devlin -- well, I
09:09:28 8 wouldn't say he's tricky, but who knows what he might try to do
09:09:32 9 at trial. And I do mean that as a compliment.

09:09:38 10 THE COURT: I can certainly police that at trial.
09:09:40 11 I'm not too concerned about that.

09:09:41 12 I find that the indictment complies with the
09:09:43 13 statute. I find based on Mr. Devlin's assurances -- and if it
09:09:48 14 tends to be that those were untrue at the time of trial, I will
09:09:52 15 deal with it then -- that the indictment adequately and clearly
09:09:57 16 gives the defendant notice of what he's going to be called upon
09:10:01 17 to defend against. And so the first amended motion for bill of
09:10:07 18 particulars is denied.

09:10:08 19 Now, I have a motion to dismiss, which is number 45
09:10:15 20 and a first amended motion to dismiss which is 58. I will
09:10:21 21 dismiss the motion -- the first motion to dismiss, number 45,
09:10:25 22 because it's superseded by the amended motion. Mr. Devlin,
09:10:30 23 you've not responded to the amended motion. Is your position
09:10:35 24 the same as it was on the bill of particulars? You wish to
09:10:38 25 present your original response as a response to the amended

09:10:42 1 motion and have it considered that way?

09:10:44 2 MR. DEVLIN: Yes, Your Honor. And my response is
09:10:46 3 document number 50. That was my original response. And,
09:10:50 4 actually, the timing of my response was after the second
09:10:52 5 superseding indictment, but it was prior to the amended
09:10:55 6 motion. So I believe that this adequately addresses the
09:10:57 7 amended motion.

09:10:58 8 THE COURT: All right. Mr. Orr, do you care to be
09:11:00 9 heard on that?

09:11:01 10 MR. ORR: Yes, Your Honor. Yes, Your Honor. The
09:11:10 11 cases seem to rely on this marijuana case, that marijuana
09:11:15 12 affects -- intrastate marijuana might affect the clause. And
09:11:25 13 what I urge is that anything that comes within the purview of
09:11:28 14 First Amendment, anything dealing with speech or anything close
09:11:31 15 to speech, visual depictions would -- just in general, visual
09:11:34 16 depictions would be protected by the First Amendment. They may
09:11:37 17 not be protected by the First Amendment, of course, if they get
09:11:40 18 into child pornography, if they depict children or involve
09:11:44 19 children being used for sexual performances or sexual activity.

09:11:48 20 But what -- what we have here is a statute that can
09:11:54 21 allow production of child pornography merely for home usage to
09:12:01 22 be punished under the Interstate Commerce Provision. And I
09:12:07 23 believe that that in effect violates the United States
09:12:10 24 Constitution and the United States Constitution Fifth Amendment
09:12:13 25 Due Process Provision.

09:12:14 1 It allows an extension of federal jurisdiction to
09:12:21 2 matters that it ought not be dealing with. The states
09:12:27 3 themselves can deal with production of child pornography within
09:12:32 4 their borders, and I think that all 50 states do that.

09:12:35 5 I know for certain that Texas has the laws
09:12:39 6 prohibiting the usage of children in videos that depict sexual
09:12:49 7 activity by those children. And what you get here is,
09:12:52 8 Your Honor, a very laudable goal as far as nobody wants to see
09:12:58 9 children abused and used in videos, whether on the Internet or
09:13:03 10 not. But this statute in the final way, it allows punishment
09:13:11 11 of people for production of child pornography is to say has
09:13:14 12 been transported in interstate commerce.

09:13:19 13 And I think that that's a -- well, in any event,
09:13:33 14 Your Honor, if it's produced with materials and the person has
09:13:36 15 reason to know that it's going to be used in interstate
09:13:39 16 commerce and travels across state lines and that person
09:13:44 17 intentionally sends it across state lines, then that might be
09:13:49 18 within the purview of the interstate commerce clause in federal
09:13:53 19 jurisdiction.

09:13:53 20 But what we have here is part of the statute allows
09:14:00 21 that, if the video was made -- someone makes a video in their
09:14:03 22 home and then someone else transports it without the knowledge,
09:14:11 23 consent, or approval of the person who produced the video, then
09:14:14 24 the person who produced the video is liable under federal law
09:14:19 25 for production of child pornography because someone else

09:14:22 1 transported it in interstate commerce.

09:14:32 2 In other words that's the last view -- if you if you
09:14:34 3 look at 2251(a), the final phrase is: Or if such visual
09:14:43 4 depiction has actually been transported in interstate or
09:14:46 5 foreign commerce or mailed.

09:14:48 6 So what I'm saying is that that particular
09:14:52 7 phraseology of the statute wipes out hundreds of years of
09:14:58 8 Anglo-Saxon jurisprudence in just doing away with any
09:15:00 9 requirement of scienter.

09:15:06 10 THE COURT: And explain to me again, why are the
09:15:10 11 facts of this -- because I want this on the record -- different
09:15:13 12 from what the *Kallestad* case was that the Fifth Circuit had in
09:15:18 13 front of them.

09:15:19 14 MR. ORR: I think that the facts of this case,
09:15:21 15 Your Honor, are not going to show that any transportation --
09:15:24 16 well, number one, the *Kallestad* was a long time ago under a
09:15:28 17 different statute.

09:15:32 18 THE COURT: Well, I'm not sure.

09:15:33 19 MR. ORR: And I think -- I'm sorry.

09:15:34 20 THE COURT: Go ahead.

09:15:35 21 MR. ORR: Well, I think under the facts of this case,
09:15:39 22 if I can step into --

09:15:41 23 THE COURT: *Kallestad* was 2000. That's not a
09:15:43 24 particularly long time ago for me.

09:15:45 25 MR. ORR: Well, the facts -- actually, I know a

09:15:47 1 little bit about it because I represented Kallestad in state
09:15:49 2 court and then he got indicted in federal. And I think all the
09:15:53 3 facts underlying that arose sometime in the '90s.

09:15:57 4 THE COURT: All right. Go ahead.

09:15:58 5 MR. ORR: And so far as the -- in this -- I think
09:16:04 6 that possibly the entire statute is not unconstitutional. But
09:16:08 7 that phraseology I think, and I think they may want to rely on
09:16:13 8 that to some extent, that it has been transported.

09:16:16 9 THE COURT: Well, what's the difference between child
09:16:18 10 pornography and firearms when it comes to statutes such as
09:16:22 11 that?

09:16:23 12 MR. ORR: I think that the firearm, when you receive
09:16:25 13 the firearm -- if I am a convicted felon and I get a firearm
09:16:30 14 and I buy a Smith & Wesson from Connecticut, I guess it is, or
09:16:35 15 wherever they have come from, then I have received it after
09:16:38 16 it's been transported in interstate commerce. And I am
09:16:40 17 presumed to know that it was transported in interstate
09:16:43 18 commerce, or at least I can look at it and make some
09:16:46 19 determination that it was transported in interstate commerce.

09:16:49 20 In this particular situation, we have the exact
09:16:51 21 opposite, that I produced a firearm in the State of Texas and
09:16:55 22 don't intend for it to go anywhere. I'm going to have a
09:16:59 23 machine shop in my garage, and I hide that firearm very
09:17:02 24 carefully so no one can steal it. And low and behold, my home
09:17:06 25 is burglarized one day, and somebody transports that firearm to

09:17:10 1 Oklahoma or Louisiana, wherever. And then all of a sudden, I'm
09:17:14 2 a firearm criminal because somebody has transported it in
09:17:19 3 interstate commerce although I had nothing to do with it.

09:17:27 4 THE COURT: Mr. Devlin?

09:17:28 5 MR. DEVLIN: Well, Judge, again, we share your
09:17:33 6 concern, that there really is no difference between the firearm
09:17:36 7 statutes and the child pornography statutes in terms of the
09:17:41 8 interstate nexus. In the firearm statute, it's very well
09:17:45 9 established that the defendant does not have to have anything
09:17:47 10 to do with the prior movement in interstate commerce of the
09:17:50 11 firearm.

09:17:51 12 Similarly, there is no requirement that the defendant
09:17:54 13 have anything to do with the interstate transportation or the
09:17:57 14 interstate or foreign transportation of any of the child
09:18:02 15 pornography. That's just simply a jurisdictional hook for
09:18:05 16 federal jurisdiction. As I've mentioned in my reply brief, the
09:18:09 17 fact that we have alleged that the visual depiction was
09:18:11 18 transported in interstate and foreign commerce is a sufficient
09:18:15 19 interstate nexus to overcome any -- any motion to dismiss under
09:18:20 20 the commerce clause.

09:18:22 21 And as you -- in the case of *United States v.*
09:18:28 22 *Jerónimo-Baustista*, the 10th Circuit case that I cite, the
09:18:32 23 Court found that purely intrastate production of child
09:18:35 24 pornography is reachable under the Commerce Clause. And that
09:18:39 25 was where the second prong, where the materials had been moved

09:18:43 1 in interstate commerce, was used. But in this case we don't
09:18:47 2 have that alleged anymore in the second superseding
09:18:49 3 indictment. We're showing that the visual depiction was
09:18:52 4 transported in interstate or foreign commerce. That's
09:18:54 5 certainly more than sufficient interstate nexus to bring this
09:18:58 6 within the jurisdiction of the Court and to overcome a motion
09:19:02 7 to dismiss.

09:19:03 8 There is no scienter requirement for that because,
09:19:03 9 again, it's just a jurisdictional hook. The defendant has to
09:19:06 10 have nothing to do with the transportation. The gravamen of
09:19:09 11 the offense is not the transportation, but it's the use,
09:19:12 12 employment, corrosion, et cetera of a minor for the purpose of
09:19:15 13 producing child pornography. That's the gravamen of the
09:19:19 14 offense.

09:19:20 15 The interstate transportation just simply brings it
09:19:23 16 within the jurisdiction of the federal court. So the scienter
09:19:27 17 requirement is not -- there's no scienter requirement under the
09:19:29 18 circumstances.

09:19:30 19 I don't know if he addressed vagueness. I've
09:19:33 20 addressed it in my response. I don't think there's anything
09:19:36 21 vague about the statute. Certainly there's nothing vague about
09:19:39 22 the indictment. He hasn't alleged what is vague about the
09:19:44 23 statute or the indictment. And if his concern is, well, he
09:19:48 24 doesn't know how it was transported in interstate or foreign
09:19:51 25 commerce, we're going to certainly show that it was transported

09:19:54 1 in interstate or foreign commerce at trial. So there shouldn't
09:19:57 2 be any vagueness concerns. So we would ask that you deny the
09:20:01 3 defendant's motion to dismiss.

09:20:03 4 THE COURT: Mr. Orr, anything further on the motion
09:20:04 5 to dismiss?

09:20:05 6 MR. ORR: Yes, Your Honor. We just -- it may be the
09:20:10 7 gravamen of the offense that it's the production of child
09:20:15 8 pornography, use of children in a video depicting some sort of
09:20:19 9 sexual activity. And he says, well, it's just the commerce
09:20:22 10 that gives the federal courts jurisdiction. But that's a
09:20:24 11 pretty important item, to take a guy from state court to
09:20:28 12 federal court based on some vague idea that somebody has in the
09:20:32 13 past transported or somebody, before we get to court --
09:20:37 14 sometime after the production of the video and sometime before
09:20:41 15 we get to court has moved the stuff in interstate commerce.

09:20:45 16 And I would cite the Court to Schaefer --
09:20:48 17 *United States v. Schaefer* out of 10th Circuit, 501 F.3d 1197,
09:20:58 18 where the Court held -- merely showing that a video is on the
09:21:01 19 Internet is not enough to show that the images moved across the
09:21:06 20 state lines. And I don't know that the government -- I think
09:21:11 21 the complaint in this case shows, according to the government's
09:21:15 22 theory, that the videos -- the beginning video -- and I think
09:21:18 23 the discovery shows the beginning videos -- the videos are made
09:21:22 24 in the year 2000. That's the government allegation I think,
09:21:25 25 insofar as we have received through discovery.

09:21:28 1 Then the allegation becomes based on the discovery
09:21:31 2 and the complaint that the items appear on the Internet in
09:21:35 3 2005. Then along about somewhere in last year, the government
09:21:41 4 begins to identify Mr. Diehl and concludes that he must have
09:21:46 5 something to do with this. So in other words, there's this
09:21:49 6 five-year -- two five-year gaps here. Five years from the date
09:21:53 7 of alleged production to the time it appears on the Internet
09:21:56 8 and is discovered by the people who scan the Internet for this
09:21:59 9 sort of activity. And then five years after that, Mr. Diehl is
09:22:02 10 identified as supposedly the person who had the -- dealt with
09:22:06 11 the production of this stuff.

09:22:07 12 So I think we have a vastly different situation from
09:22:13 13 a situation where it's a gun or drugs. In other words, what
09:22:21 14 you have here is basically that they found the videos on the
09:22:26 15 Internet. That's not enough to show -- number one, it's not
09:22:33 16 enough to show that it has been transported under the meaning
09:22:37 17 of the statute. And then there's no showing that Mr. Diehl
09:22:39 18 transported it. And the statute would then be unconstitutional
09:22:45 19 for allowing Mr. Diehl --

09:22:46 20 THE COURT: I don't think that all of those showings
09:22:49 21 have to be made for purposes of a motion to dismiss. The
09:22:53 22 government still has to prove their case beyond a reasonable
09:22:56 23 doubt and prove every element of the offense beyond a
09:23:00 24 reasonable doubt. They do not have to show at the motion
09:23:05 25 dismiss stage that they've already proved every element of

09:23:10 1 their case beyond a reasonable doubt.

09:23:13 2 MR. ORR: Yes, Your Honor.

09:23:16 3 THE COURT: Well, I just think that maybe the cart is
09:23:19 4 ahead of the horse here on the base of what the government has
09:23:23 5 to prove. I find that the indictment is not vague, ambiguous,
09:23:27 6 and overly broad. And I further find that the applicable
09:23:31 7 statutes are not vague, uncertain, or in violation of the Fifth
09:23:34 8 Amendment. So that leaves us with whether or not Congress has
09:23:39 9 the authority to regulate what you assert are wholly intrastate
09:23:44 10 production of child pornography.

09:23:47 11 For purposes of the motion to dismiss, I'm going to
09:23:51 12 deny the motion to dismiss because the government has pleaded
09:23:55 13 facts which it proved beyond a reasonable doubt which satisfy
09:24:01 14 their burden. By pleading them as they have pleaded them, I
09:24:08 15 think they satisfy the requirements of invoking this Court's
09:24:14 16 jurisdiction. And so I'll deny the motion to dismiss, but you
09:24:22 17 may argue at the close of the government's evidence that they
09:24:24 18 haven't gotten there based on what that evidence is and whether
09:24:27 19 or not they've proved it beyond a reasonable doubt.

09:24:29 20 MR. ORR: Yes, Your Honor.

09:24:30 21 THE COURT: Now, I've got two motions in limine left,
09:24:34 22 documents 59 and 60. What are you after there?

09:24:51 23 MR. ORR: Your Honor, 59 deals with the government's
09:24:53 24 contention that they have videos that depict Mr. Diehl's hand
09:24:56 25 in the videos. Motion in Limine Number 60 deals with the

09:25:05 1 videos. I'd like to keep the videos from the presence of the
09:25:10 2 jury until Your Honor has decided that they are admissible.
09:25:14 3 They don't constitute any sort of using of the same videos in
09:25:21 4 different counts, if they're otherwise authenticated, that the
09:25:26 5 proper predicate for a video or any kind of visual depiction in
09:25:30 6 any trial of any kind has been laid by the government.

09:25:35 7 THE COURT: Well, I'm not going to allow them to
09:25:37 8 publish the video to the jury until they've proved its
09:25:41 9 admissibility. Mr. Devlin is going to have to establish the
09:25:44 10 basis and predicate and is going to have to move its admission
09:25:47 11 before it's displayed -- any video's admission before they're
09:25:51 12 displayed and published to the jury, at which time you get an
09:25:53 13 opportunity to object.

09:25:54 14 MR. ORR: I would urge that in this particular case
09:25:58 15 with these types of videos, Your Honor, that there should be a
09:26:02 16 hearing outside the presence to the jury before this is offered
09:26:04 17 to the jury. Because if something is offered and a predicate
09:26:07 18 isn't properly laid, then the jury will have an idea what's
09:26:10 19 really going on in the videos and Mr. Diehl will be prejudiced
09:26:15 20 thereby.

09:26:15 21 THE COURT: Mr. Devlin?

09:26:16 22 MR. DEVLIN: Well, Judge, if I don't lay the proper
09:26:20 23 predicate and the evidence is not admitted, we're talking this
09:26:23 24 is a child pornography case, not a white collar fraud case that
09:26:27 25 has child pornography.

09:26:28 1 THE COURT: I tend to think the cat is going to be
09:26:30 2 out of the bag when the indictment is going to be read to the
09:26:34 3 jury, Mr. Orr, about what all of this evidence involves. But
09:26:38 4 go ahead, Mr. Devlin.

09:26:40 5 MR. DEVLIN: I'm sorry. I interpret, at least on the
09:26:43 6 motion in limine and Document 60, I just simply interpret as a
09:26:48 7 motion to file the rules of evidence, which we intend to do.
09:26:51 8 So I don't plan on showing the video to the jury and then
09:26:54 9 laying the predicate. I plan on laying the predicate and then
09:26:57 10 moving for its admission, and if admitted, showing it to the
09:27:00 11 jury.

09:27:00 12 THE COURT: And what is the business in Document
09:27:03 13 Number 59 about the hand?

09:27:05 14 MR. DEVLIN: Well, Judge --

09:27:06 15 THE COURT: Do you have an expert on hand comparison?

09:27:11 16 MR. DEVLIN: I don't plan to have an expert on hand
09:27:13 17 comparisons. All that is, is we have pictures -- our case
09:27:18 18 revolves around proving that the defendant was in those videos
09:27:21 19 and, therefore, produced them.

09:27:22 20 Part of identifying the defendant is identifying
09:27:26 21 marks and body parts and things like that in the video that may
09:27:30 22 correspond to him. And so I think the jury is fully capable of
09:27:34 23 doing that on its own without an expert. We don't plan to have
09:27:38 24 a hand comparison expert. So I will certainly -- if there's
09:27:41 25 any evidence to be introduced or alluded to, I will certainly

09:27:45 1 admit it properly and then make appropriate arguments and
09:27:50 2 inferences based on the evidence as required -- as allowed by
09:27:54 3 the rules of evidence.

09:27:55 4 THE COURT: Well, Mr. Orr, what do you have to say
09:27:57 5 about that?

09:27:57 6 MR. ORR: Well, I think whether it's an expert or
09:28:01 7 not, any identification of someone by a hand or a supposed
09:28:06 8 crooked finger or bent finger is pretty weak stuff.

09:28:12 9 THE COURT: Well, why doesn't that go to the weight,
09:28:14 10 not the admissibility?

09:28:15 11 MR. ORR: Well, that argument could be made,
09:28:17 12 Your Honor. I just think that even -- it's just highly
09:28:20 13 prejudicial to say that's his finger. And I think the
09:28:22 14 prejudicial value of that sort of thing is outweighed by
09:28:26 15 some -- a lay opinion or an expert opinion to think you can
09:28:30 16 identify people by their fingers.

09:28:33 17 THE COURT: I'm not sure that we ever get to opinion
09:28:35 18 here. I may very well not allow whatever witness is looking at
09:28:39 19 that to state an opinion. I'm going to deny those two motions
09:28:42 20 in limine. I think I can handle any objections to that
09:28:46 21 evidence as it comes up.

09:28:48 22 The Government with regard to motion in limine which
09:28:53 23 is Document 60 is going to be required to establish predicate
09:28:58 24 to admit any video before any of it is published to the jury.
09:29:03 25 Any video published to the jury on the motion in limine, you

09:29:10 1 know, I'll make a decision on whether I'll allow a conclusion
09:29:12 2 to be drawn as it comes up.

09:29:14 3 All right. Then I think that deals with every
09:29:20 4 defendant's motion except the motion to suppress statements,
09:29:25 5 where we'll hear some evidence and we also have the
09:29:28 6 United States' motion to protect the privacy of juvenile
09:29:33 7 victims and witnesses. Mr. Orr, have you had an opportunity to
09:29:36 8 review that?

09:29:36 9 MR. ORR: Yes, Your Honor.

09:29:37 10 THE COURT: Do you have any objection to that motion?

09:29:39 11 MR. ORR: No, Your Honor.

09:29:39 12 THE COURT: All right. Then the government's motion
09:29:41 13 to protect privacy --

09:29:43 14 MR. ORR: Excuse me. We do object to that motion,
09:29:46 15 Your Honor. We think the full identity of these people should
09:29:49 16 be allowed in front of the jury.

09:29:51 17 THE COURT: Why?

09:29:53 18 MR. ORR: In order -- under the confrontation clause,
09:29:56 19 Your Honor, we should be able to allow to fully and fairly
09:29:59 20 confront the witnesses.

09:30:00 21 THE COURT: Well, I think you're going to be allowed
09:30:03 22 to fully confront the witnesses. The thrust of the motion,
09:30:09 23 Mr. Devlin, is primarily that we close the courtroom and
09:30:13 24 recognize their situation. And then we also protect the
09:30:22 25 identity by not placing it in the record. How does that

09:30:26 1 destroy your right to confront them?

09:30:28 2 MR. ORR: Well, Mr. Diehl has a right to a full,
09:30:31 3 speedy, and public trial, Your Honor. So I think closing the
09:30:34 4 courtroom would be in violation of that right under the
09:30:36 5 United States Constitution.

09:30:37 6 THE COURT: Mr. Devlin?

09:30:38 7 MR. DEVLIN: Your Honor, I think that's been
09:30:40 8 addressed under 3509. It's designed to -- the right to a
09:30:45 9 public trial is not absolute, and it is subject to reasonable
09:30:50 10 narrowly tailored measures when circumstances dictate that it
09:30:54 11 should be. And Section 3509 has been found to be one of those
09:30:59 12 circumstances. We plan to have the victims in this case
09:31:02 13 testify. We plan as -- we plan to identify them.

09:31:07 14 And if we have the courtroom closed, we can identify
09:31:10 15 them by their true names, because that's kind of the purpose of
09:31:14 16 closing the courtroom. But it is also to allow them, again,
09:31:19 17 not to have their identities revealed. Identifying them as
09:31:23 18 Jane Doe Number 1, 2, and 3 while having the public being able
09:31:27 19 to come in and see them is not going to sufficiently protect
09:31:30 20 their interest as child victims.

09:31:33 21 The twist in this case is that we've alleged that all
09:31:38 22 these offenses occurred about ten years ago, when all of these
09:31:41 23 victims were children. And that's -- I'm talking Jane Doe
09:31:46 24 Number 1, 2 and 3, and then John Doe. Two of the victims are
09:31:51 25 now over the age of 18 and two are still under the age of 18.

09:31:53 1 So there's no question on the two that are under the age of
09:31:55 2 18. The question really goes to the two that are over the age
09:31:57 3 of 18.

09:31:58 4 And our argument is that it was the intent of the
09:32:01 5 statute to protect children because these offenses occurred
09:32:04 6 when these -- when Jane Doe Number 1 and 2 were children; that
09:32:09 7 those interests still apply; that they should not have -- be
09:32:13 8 subject to their identities being revealed and to an open
09:32:18 9 courtroom just because they happen to have turned of age prior
09:32:22 10 to trial.

09:32:22 11 So under the circumstance, we believe that the
09:32:26 12 courtroom should be closed for all of them because of the fact
09:32:29 13 that they were child victims at the time of the offenses. And
09:32:33 14 the constitutionality of section 3509 has not been -- has
09:32:38 15 certainly not been -- 3509 has certainly not been found to be
09:32:44 16 unconstitutional, and we are certainly tailoring it to limit
09:32:47 17 the disclosure of the child victims' identities and any
09:32:50 18 information relating to the children which 3509 also requires
09:32:57 19 not to be disclosed.

09:32:58 20 So that will require that the courtroom be closed
09:33:00 21 when these victims testify and when any person whose identity
09:33:05 22 may reveal the victims identity may testify; namely, any parent
09:33:09 23 or other relative of the child victims which we intend --

09:33:15 24 THE COURT: Well, let me address that, because I am
09:33:17 25 concerned that that could get a little broad. Is it not

09:33:20 1 adequate if persons who have knowledge of the names of the
09:33:25 2 victim -- victims merely identify them as "Jane Doe" and "John
09:33:31 3 Doe" and by number? Cannot we handle that that way without
09:33:35 4 having to close the courtroom when persons who are not the
09:33:39 5 alleged victim themselves are testifying?

09:33:42 6 MR. DEVLIN: I would be open to that Judge. Again,
09:33:44 7 the only concern is that people aren't -- you know, we as
09:33:47 8 attorneys are used to doing that and you as the Judge, but I
09:33:50 9 don't think the witness may be in a position to be able to do
09:33:53 10 that uniformly across the board. And any disclosure -- any
09:33:58 11 inadvertent disclosure of the true name of a victim I think
09:34:02 12 would be harmful to that victim.

09:34:03 13 THE COURT: Well, I agree with you, although I am
09:34:06 14 concerned about the *narratus*. And I think that you are capable
09:34:16 15 of addressing this with the witnesses and we have a couple of
09:34:25 16 weeks before trial that they're not to use any names. At least
09:34:29 17 I'm going to start it that way. I'm going to grant this
09:34:34 18 motion, and the courtroom will be closed at any time that any
09:34:43 19 of the alleged victims is testifying.

09:34:47 20 I do find the mere fact that they are adults at this
09:34:50 21 time does not place them outside of the 3509, and I exercise my
09:35:01 22 discretion. I recognize that does not mandate closing the
09:35:05 23 courtroom, but I exercise my discretion with regard to when the
09:35:11 24 victims are testifying. I instruct both sides to not ask
09:35:15 25 questions of other witnesses that would reveal true names of

09:35:21 1 these people.

09:35:22 2 MR. ORR: May I just urge for the record, I want to
09:35:24 3 make sure it's clear and I think it's been discussed, but at
09:35:27 4 least three of the alleged victims are in excess of 18 years
09:35:30 5 age now, Your Honor.

09:35:32 6 MR. DEVLIN: Two.

09:35:33 7 MR. ORR: Two

09:35:33 8 THE COURT: Two is the information I'm given by the
09:35:36 9 government.

09:35:38 10 MR. ORR: Well, I think that at least this statute
09:35:42 11 shouldn't apply to those people. If you want to use -- I think
09:35:49 12 just closing the courtroom is too strong a remedy for what the
09:35:53 13 government proposes here and is in violation of the
09:35:56 14 United States Constitution Sixth Amendment right to a public
09:35:59 15 trial, Your Honor.

09:36:00 16 MR. DEVLIN: We're simply asking the courtroom be
09:36:02 17 closed during the testimony of those victims. And so that's --
09:36:06 18 that's the narrow -- that's a narrowing tailoring that we're
09:36:10 19 asking for at this point.

09:36:12 20 THE COURT: I'm going to grant the motion to the
09:36:15 21 extent the courtroom will be closed during the testimony of any
09:36:18 22 alleged victim. I again state that I instruct both lawyers to
09:36:24 23 instruct their witnesses and prepare their witnesses not to use
09:36:30 24 the true names of those victims when they're testifying about
09:36:36 25 the victims.

09:36:37 1 I think it can be handled that way. I do not think
09:36:40 2 the defendant has been denied his right to a public trial. In
09:36:46 3 balancing the factors here and in reviewing what the Supreme
09:36:49 4 Court has said about narrow tailoring in *Globe Newspaper*
09:36:58 5 *Company* and in reviewing section 3509, I think that such an
09:37:02 6 order as I have just rendered will protect the rights of this
09:37:06 7 defendant and will give him a public trial.

09:37:16 8 I think the defendant reads "public trial" too
09:37:19 9 broadly. This case is on the docket. It's known that it will
09:37:25 10 be held. It is known that it will be going on. It is known
09:37:31 11 that witnesses will be called and brought in. The media and
09:37:35 12 other members of the public who have an interest in observing
09:37:39 13 this trial will be present during all but when the alleged
09:37:47 14 victims themselves testify. And I think and I do find that the
09:37:54 15 rights of this defendant under the Constitution will be
09:37:56 16 adequately protected by that. So that will be my ruling on the
09:38:02 17 motion.

09:38:02 18 Now, the government has also filled a Notice of Other
09:38:07 19 Crimes, Wrongs, and Acts, Document 51. That's just a notice to
09:38:10 20 you, Mr. Orr. You receive that and you're aware of it?

09:38:14 21 MR. ORR: Yes, Your Honor.

09:38:14 22 THE COURT: All right. With the exception of the
09:38:16 23 motion to suppress, are there any motions filed by either the
09:38:20 24 government or the Defense that I have not referred to or we've
09:38:23 25 not discussed that I need to take up other than the motion to

09:38:26 1 suppress?

09:38:28 2 MR. DEVLIN: No more that have been filed,
09:38:30 3 Your Honor. There is one matter that I would like to address
09:38:32 4 with the Court, and I think it's more of an awareness
09:38:37 5 discussion than it is anything else.

09:38:40 6 We anticipate presenting 13 child porn videos. I
09:38:49 7 think that's the count of -- you know, throughout the
09:38:52 8 ten counts. Showing those in their entirety, I estimate -- I
09:38:59 9 haven't added them all up -- but it's probably going to be
09:39:01 10 about two hours worth of child porn.

09:39:04 11 The Department of Justice and I know that the
09:39:06 12 investigating agencies have pretty actively monitored the
09:39:15 13 mental well-being of its prosecutors and agents. And my
09:39:18 14 concern is that we have jurors coming in who are going to be
09:39:22 15 not expecting this kind of thing, and they're going to be
09:39:25 16 watching a lot of child pornography. I don't know what's --
09:39:28 17 what the reaction is going to be.

09:39:30 18 Clearly we can address it in voir dire and ahead of
09:39:33 19 time. But I just don't -- these are all disturbing videos, and
09:39:37 20 there's at least one that's particularly shocking even to
09:39:39 21 someone like me who sees these all the time. I just don't know
09:39:42 22 what the reaction of the jurors is going to be afterwards, and
09:39:45 23 I don't know what impact that might have on a juror dropping
09:39:49 24 out. I don't know if the Court wants to consider having
09:39:53 25 additional alternate jurors in light of the possible -- I call

09:39:55 1 it shock value, but I think that's what it's going to have.

09:39:58 2 I know that murder cases and homicide cases are tried
09:40:00 3 all the time with gruesome photographs, but this is going to be
09:40:04 4 at that level because of the nature of the child porn. So I
09:40:07 5 simply raise that as a concern. I don't know how to address
09:40:11 6 that best. I don't know what will happen if a juror sees these
09:40:16 7 and they are, you know, overcome by -- by being disturbed by
09:40:19 8 the nature of these videos and what to do there.

09:40:22 9 I just want to put that out to the Court to perhaps
09:40:24 10 consider at least alternate jurors. And I don't know about
09:40:28 11 counseling opportunities if any juror needs them afterwards,
09:40:32 12 because this is going to shock the sensibilities of ordinary
09:40:35 13 people. And it's going to be unfortunately -- unfortunately,
09:40:40 14 because of the nature of the case, I have to show these to not
09:40:43 15 only show sexually explicit conduct to show the identity of the
09:40:49 16 defendant in that. And so there's no avoiding that.

09:40:52 17 I'm going to try to cut it down as best I can,
09:40:54 18 Judge. I'm certainly going to -- part of my strategy as well
09:40:58 19 is to take still photographs of those and show them to the
09:41:01 20 witnesses. I do not plan on showing any of the videos to any
09:41:04 21 of the victims or the witnesses. I'm going to do that through
09:41:07 22 still photographs and probably have the videos introduced
09:41:09 23 through the agents to try to minimize that. But I don't know
09:41:12 24 how much I can minimize the impact on the jury. So I just
09:41:15 25 simply throw that out for the Court's consideration.

09:41:17 1 THE COURT: Mr. Orr, comments? Any ideas?

09:41:21 2 MR. ORR: Well, you know, I just did one of these in
09:41:31 3 state court involving some child alleged -- it was child
09:41:35 4 pornography. And the jury I don't think enjoyed it, but I
09:41:38 5 don't know that they needed any counseling. I think that, you
09:41:41 6 know, it's not -- it's not pretty stuff. But in that case, the
09:41:47 7 State used some video that allegedly was produced by the
09:41:53 8 defendant and they used some other stuff that was not produced
09:41:56 9 by him, and I don't think any the jury enjoyed it. It's not
09:42:05 10 pleasant. But I think that in this particular situation, I
09:42:10 11 don't know whether we need alternate jurors or not. That's the
09:42:14 12 decision for the Court.

09:42:15 13 THE COURT: As both of you know, I always take two
09:42:17 14 alternate jurors in a criminal case anyway. The question would
09:42:20 15 be whether I would take three or four in this case, but there
09:42:24 16 definitely would be two alternate jurors in this case. We'll
09:42:28 17 have the regular 12 and two alternates because that's what -- I
09:42:31 18 always take two alternates. And I've had another case where
09:42:36 19 I've taken four alternates. I did it in that case because it
09:42:39 20 was going to be an extremely lengthy case, and I felt certain
09:42:43 21 we would lose jurors as we go along. At the end of the day,
09:42:47 22 none of the alternates got to deliberate. We didn't lose a
09:42:50 23 single juror during the course of that trial.

09:42:52 24 MR. ORR: Yes.

09:42:53 25 THE COURT: So I'll just consider that. Let me ask

09:42:57 1 both of you how long do you think this case will take to try?

09:42:59 2 MR. DEVLIN: I don't think it will -- I think we
09:43:01 3 should be wrapped up no later than Friday if we start on
09:43:05 4 Tuesday.

09:43:07 5 THE COURT: Mr. Orr?

09:43:08 6 MR. ORR: I agree with that.

09:43:16 7 THE COURT: As you know, I generally give both sides
09:43:20 8 some time to voir dire, not a lot of time to voir dire. It's a
09:43:27 9 little bit different case. What do you think will be --
09:43:30 10 knowing that this is not state court, I'm not going to give you
09:43:35 11 free discretion. What are your ideas on what would be a
09:43:39 12 reasonable amount of time for you to ask some questions?

09:43:41 13 MR. ORR: I don't know. Twenty minutes, maybe.

09:43:44 14 MR. DEVLIN: Twenty minutes would be fine, Judge.

09:43:46 15 MR. ORR: Well, I had unlimited time in the one I
09:43:48 16 tried in state court. It did me no good whatsoever. So ...

09:43:52 17 THE COURT: I'll give you each 20 minutes voir dire.
09:43:55 18 That will give you some time to bore in on things.

09:43:57 19 Now, we're set for the 11th, as you know. And while
09:44:00 20 we're on the question of voir dire, I do most of the voir
09:44:04 21 dire. I'm going to give you an opportunity to voir dire. I
09:44:09 22 would like any particular questions you want incorporated in my
09:44:14 23 voir dire filed no later than Wednesday, the 5th.

09:44:19 24 MR. ORR: Yes, sir.

09:44:20 25 THE COURT: By the same -- and any charge materials

09:44:33 1 you want, I want by Wednesday, the 5th also so we can begin
09:44:38 2 working on the Court's charge before trial. Because as I
09:44:45 3 always do, once both sides rest and close, I like to get this
09:44:50 4 case to the jury as quickly as I can get it to the jury.

09:44:54 5 MR. DEVLIN: Yes, sir. The government has already
09:44:57 6 submitted its proposed charges.

09:45:00 7 MR. ORR: We'll be preparing some, Your Honor. We'll
09:45:03 8 get them filed on time.

09:45:04 9 THE COURT: Now, I don't think the charge will be
09:45:06 10 particularly difficult in this case. How much time, providing
09:45:09 11 this case survives the motion to suppress -- and I'm going to
09:45:12 12 hear testimony on it -- how much time do you believe you need
09:45:14 13 for opening statements in this case?

09:45:21 14 MR. DEVLIN: No more than 30 minutes, Judge, I think.

09:45:24 15 MR. ORR: I think that would be plenty, Your Honor.

09:45:26 16 THE COURT: All right. I'll give you 30 minutes to
09:45:28 17 the side. Be reminded that on opening statements, the
09:45:36 18 government doesn't get to open and hold part of its time back.
09:45:41 19 Mr. Devlin, you'll make your opening statement. Mr. Orr, you
09:45:44 20 can make yours immediately following or you can wait, of
09:45:47 21 course, until the defense's time. But you'll have 30 minutes
09:45:50 22 to the side for opening statements.

09:45:53 23 All right. Anything -- and I'll ask you this again
09:45:57 24 before we adjourn today, but anything either one of you wants
09:46:00 25 to bring up at this point that we haven't covered before we get

09:46:04 1 into hearing evidence the government has with regard to the
09:46:09 2 motion to suppress?

09:46:10 3 MR. DEVLIN: Nothing else from the government at this
09:46:12 4 point, Your Honor.

09:46:13 5 MR. ORR: No, Your Honor.

09:46:14 6 THE COURT: All right. Mr. Devlin, then I will call
09:46:17 7 the motion to suppress statements, which -- the defendant's
09:46:21 8 motion to suppress statements which is Document Number 33. I
09:46:24 9 understand you have some evidence in that regard?

09:46:26 10 MR. DEVLIN: Yes, Your Honor. We would call
09:46:27 11 Special Agent Sean Mullen.

09:46:54 12 (Witness sworn)

09:46:54 13 **SEAN MULLEN,**

09:46:54 14 having been first duly sworn, testified as follows:

09:46:54 15 **DIRECT EXAMINATION**

09:46:54 16 **BY MR. DEVLIN:**

09:46:54 17 Q. You are Special Agent Sean Mullen, M-u-l-l-e-n, of the
09:46:55 18 Federal Bureau of Investigation?

09:46:57 19 A. That's correct.

09:46:58 20 Q. And you're based here in Austin?

09:46:59 21 A. Yes, sir.

09:46:59 22 Q. And how long have you been with the FBI?

09:47:02 23 A. Just over seven years.

09:47:03 24 Q. And you are the lead agent, if you will, on this case; is
09:47:06 25 that correct?

09:47:06 1 A. That is correct.

09:47:07 2 Q. Were you involved with the arrest of the defendant in this
09:47:11 3 case, David Andrew Diehl, on April 6th, 2010?

09:47:15 4 A. Yes, I was.

09:47:16 5 Q. Where did that arrest occur?

09:47:18 6 A. Ponte Vedra, Florida.

09:47:22 7 Q. And that is -- the defendant was residing in Florida at
09:47:24 8 that time?

09:47:25 9 A. Yes, he was.

09:47:26 10 Q. All right. Can you describe the circumstances of the
09:47:27 11 arrest, please.

09:47:28 12 A. Yes. The arrest occurred just off of Route A1A in
09:47:33 13 Ponte Vedra. Agents approached Mr. Diehl. He was with another
09:47:38 14 individual at the time.

09:47:38 15 Q. What time of day was this?

09:47:39 16 A. Approximately 6:30, 6:45 at night. He was advised that he
09:47:43 17 was under arrest and what the charges were. He was placed in
09:47:48 18 the handcuffs, advised not to make any statements, was brought
09:47:52 19 to a vehicle where he was shown an FD-395 Advice of Rights form
09:47:56 20 and verbally provided his rights again. And then he read the
09:48:00 21 form, advised he understood those rights, and then advised he
09:48:04 22 was willing to speak with the agents at the time and signed a
09:48:07 23 form to waive his rights.

09:48:09 24 Q. Okay.

09:48:15 25 MR. ORR: No objection.

09:48:15 1 MR. DEVLIN: May I approach the witness?

09:48:19 2 THE COURT: Yes. You want to offer that?

09:48:20 3 MR. DEVLIN: I'm going to show the witness this.

09:48:22 4 Yes, I'm going to offer --

09:48:23 5 Q. (BY MR. DEVLIN) I'm going to show you what is marked as

09:48:25 6 Government's Exhibit Number 1. Is that a copy of the original

09:48:27 7 of the FD-395 Advice of Rights form?

09:48:30 8 A. Yes, it is.

09:48:31 9 Q. And is that a fair and accurate copy of the document?

09:48:34 10 A. Yes, it is.

09:48:34 11 Q. And does that indicate -- was that prepared at or near the

09:48:38 12 time that it was -- that the rights were given to Mr. Diehl?

09:48:41 13 A. Yes, it was.

09:48:42 14 Q. And it contains information on the location, the date, and

09:48:45 15 the time. And the time in it is indicated at 6:45 p.m.?

09:48:50 16 A. That's correct.

09:48:50 17 Q. Okay. And that contains Mr. Diehl's signature, and also

09:48:54 18 one of them is your signature?

09:48:56 19 A. That is correct.

09:48:57 20 MR. DEVLIN: All right. I move to admit Government

09:48:58 21 Exhibit 1 for purposes of this hearing.

09:49:00 22 MR. ORR: I have no objection.

09:49:01 23 THE COURT: Government's Exhibit Number 1 is admitted

09:49:03 24 for purposes of this hearing.

09:49:09 25 Q. (BY MR. DEVLIN) The other signature on there, the top one,

09:49:11 1 is the other special agent - the other FBI agent with you?

09:49:13 2 A. Yes, it is.

09:49:14 3 Q. And his name was Jonathan McDonald?

09:49:17 4 A. Yes, it was.

09:49:18 5 Q. Okay. And, now, prior to that, I take it that you went

09:49:23 6 through that Advice of Rights form as it is laid out as it's

09:49:26 7 written; is that correct?

09:49:27 8 A. That is correct.

09:49:28 9 Q. And Mr. Diehl was -- his attention was directed to that

09:49:31 10 form as well?

09:49:31 11 A. That is correct.

09:49:32 12 Q. All right. Did Mr. Diehl indicate that he understood his

09:49:35 13 rights?

09:49:35 14 A. Yes, he did.

09:49:37 15 Q. And was he asked to sign that document indicating he

09:49:40 16 understood his rights?

09:49:41 17 A. Yes, he was.

09:49:42 18 Q. Did he indicate he wished to waive his rights and speak

09:49:46 19 with you at that time?

09:49:47 20 A. Yes, he did.

09:49:48 21 Q. Prior to that document being filled out with Mr. Diehl --

09:49:50 22 and I take it that -- that David Andrew Diehl is in the

09:49:54 23 courtroom today?

09:49:54 24 A. Yes, he is.

09:49:55 25 Q. Can you please point him out and describe an article of

09:49:58 1 clothing he's wearing?

09:49:59 2 A. He's wearing a green shirt.

09:50:01 3 Q. Okay. Green V-neck shirt?

09:50:03 4 A. Yes, sir.

09:50:05 5 MR. DEVLIN: May the record reflect the witness has
09:50:06 6 identified the defendant?

09:50:07 7 THE COURT: The record will so reflect.

09:50:09 8 Q. (BY MR. DEVLIN) Prior to that -- I just want to make
09:50:12 9 clear -- was Mr. Diehl advised of his rights verbally without a
09:50:16 10 written document prior to that time?

09:50:17 11 A. Yes, he was.

09:50:18 12 Q. At what point was he verbally advised prior to filling out
09:50:23 13 that document?

09:50:23 14 A. Immediately after he was placed into custody and prior to
09:50:26 15 moving him to the vehicle.

09:50:27 16 Q. All right. Prior to him -- so that was the first
09:50:29 17 occasion, and then the written advisement, this form, was the
09:50:34 18 second advice of his rights?

09:50:36 19 A. Yes, it was.

09:50:36 20 Q. Okay. Who advised him of his rights the first time
09:50:39 21 verbally?

09:50:40 22 A. Myself and Special Agent McDonald.

09:50:42 23 Q. And how did you do that? How did you advise him of his
09:50:45 24 rights? Did you do it from memory? Did you do it using this
09:50:49 25 form?

09:50:49 1 A. I did it from memory at the time, and I advised him we'd
09:50:52 2 go over it more thoroughly once we sat down in the vehicle.
09:50:55 3 Q. Can you specifically remember what you advised him of when
09:50:58 4 you did do a verbal advise of rights?
09:51:00 5 A. I remember advising him he had a right to an attorney and
09:51:02 6 he had a right to remain silent and anything he said would be
09:51:04 7 used against him in court.
09:51:05 8 Q. Okay. Was any questioning of him done at that point?
09:51:08 9 A. No, sir.
09:51:09 10 Q. All right. When was the first question -- when was the
09:51:13 11 first time you or another law enforcement agent asked him a
09:51:17 12 question?
09:51:17 13 A. After he had signed the FD-395 waiving his rights.
09:51:21 14 Q. Okay. Can you describe to us the conversation that ensued
09:51:28 15 after you filled out Government Exhibit Number 1?
09:51:31 16 A. Yes. We asked Mr. Diehl identifying questioning to verify
09:51:37 17 his identity and then asked him various questions about where
09:51:41 18 he's lived and who he was married to previously. And we
09:51:47 19 discussed motorcycles. And then also we presented him with
09:51:51 20 photographs. Mr. Diehl insisted that we get to the point.
09:51:55 21 Q. Okay.
09:52:14 22 MR. DEVLIN: May I approach the witness, Your Honor?
09:52:17 23 THE COURT: You may.
09:52:17 24 Q. (BY MR. DEVLIN) I'm now handing you what's been marked as
09:52:20 25 Government's Exhibit Number 2. It's a five-page document. Do

09:52:23 1 you recognize that document?

09:52:27 2 A. Yes, I do.

09:52:28 3 Q. And that is a copy of the original of those five pages; is
09:52:32 4 that correct?

09:52:32 5 A. That is correct.

09:52:33 6 Q. And what is that document?

09:52:34 7 A. That document contains a photograph of a bill -- a novelty
09:52:38 8 bill and then three pages of a hand and then a final page of
09:52:45 9 two visual depictions of a minor female.

09:52:47 10 Q. And what's the relevance of this document?

09:52:49 11 A. All of these items were found to be in one of the videos
09:52:53 12 alleged in the indictment.

09:52:54 13 Q. Were these documents -- were these presented to Mr. Diehl
09:52:56 14 at the time of his interview on April 6th?

09:52:59 15 A. Yes, they were.

09:53:00 16 Q. Okay. There are handwritten notations in the document as
09:53:05 17 well. Whose handwriting is that?

09:53:07 18 A. That is mine.

09:53:07 19 Q. All right. And that handwriting is -- that is there to
09:53:11 20 indicate what?

09:53:11 21 A. It indicates what Mr. Diehl responded to when shown the
09:53:15 22 pictures and asked about them.

09:53:16 23 Q. Okay. Is that document in the same or substantially the
09:53:19 24 same condition as it was when it was presented to Mr. Diehl and
09:53:22 25 you wrote your notes on it?

09:53:24 1 A. Yes, it is.

09:53:24 2 Q. And those notes were intended to be shorthand versions of
09:53:27 3 his responses?

09:53:28 4 A. Correct.

09:53:29 5 MR. DEVLIN: For purposes of this hearing, I move to
09:53:32 6 admit Government's Exhibit Number 2?

09:53:34 7 MR. ORR: No objections for purposes of this hearing.

09:53:35 8 THE COURT: Government's Exhibit Number 2 is admitted
09:53:38 9 for purposes of this hearing.

09:53:39 10 Q. (BY MR. DEVLIN) All right. The first page has to do
09:53:41 11 with -- what appears to be a million dollar novelty bill with
09:53:46 12 the word Star Ranch and other words on it. What was asked and
09:53:50 13 what was his response to that?

09:53:52 14 A. Mr. Diehl was asked if he had ever seen that novelty bill,
09:53:56 15 and he responded he had never seen it before.

09:53:59 16 Q. And so "never seen bill" is basically a summary of his
09:54:02 17 response, correct?

09:54:03 18 A. Right.

09:54:03 19 Q. The second page depicts what?

09:54:09 20 A. It depicts what appears to be the right hand of an
09:54:13 21 individual in a somewhat fist formation.

09:54:14 22 Q. I take it that that right hand was extracted from a still
09:54:17 23 image of one of the child pornography videos that we will be
09:54:20 24 introducing at trial?

09:54:21 25 A. Yes, it was.

09:54:22 1 Q. Was he shown that?

09:54:23 2 A. Yes, he was.

09:54:24 3 Q. And what was he asked in relation to that?

09:54:26 4 A. He was asked what that was. He identified it as a hand,
09:54:29 5 and then he was asked whose hand it was. And he said it was
09:54:33 6 not his hand.

09:54:34 7 Q. It was not his hand?

09:54:35 8 A. Yeah.

09:54:35 9 Q. And then you indicate in your notes: "Hand not Diehl's
09:54:39 10 hand"?

09:54:39 11 A. Correct.

09:54:40 12 Q. The third page depicts what?

09:54:42 13 A. Appears to be a left hand in a little bit of a grasping
09:54:47 14 motion, maybe, with a wedding band on it.

09:54:49 15 Q. And that photograph was also extracted from a still image
09:54:53 16 of one of the child pornography videos?

09:54:55 17 A. Yes, it was.

09:54:56 18 Q. And both of these were actually taken out of the child
09:54:59 19 pornography videos alleged in count one; is that correct?

09:55:03 20 A. That is correct.

09:55:03 21 Q. Involving Jane Doe Number 1?

09:55:05 22 A. That is correct.

09:55:06 23 Q. What was asked and what was his response when shown that
09:55:09 24 picture?

09:55:09 25 A. Mr. Diehl was asked what that picture was. He identified

09:55:12 1 it as a hand and then asked whose hand it was. He identified
09:55:15 2 that it could be his hand.

09:55:16 3 Q. Okay. And that is noted on there as "Could be Diehl's
09:55:19 4 hand." That's shorthand for his response?

09:55:21 5 A. Correct.

09:55:21 6 Q. All right. And what's the fourth picture?

09:55:24 7 A. This is also what appears to be a left hand, this time the
09:55:27 8 palm of it, also taken from -- the still image taken from the
09:55:33 9 videos alleged in count one.

09:55:34 10 Q. Okay. And what was he asked, and what was his response?

09:55:38 11 A. He was asked if what that picture depicted. He responded
09:55:41 12 it was a hand. He also responded that -- when asked whose hand
09:55:44 13 it was, that he didn't know and that it doesn't look like his
09:55:47 14 hand -- it doesn't look like my hand to me.

09:55:51 15 Q. Okay. And the fifth page depicts what?

09:55:54 16 A. Has two pictures, both of the face of a minor female
09:55:59 17 identified as Jane Doe Number 1 in the alleged videos -- the
09:56:02 18 videos in count one.

09:56:03 19 Q. All right. And what was he asked and what was his
09:56:06 20 response in relation to those?

09:56:08 21 A. He was asked if he could identify who that was. And he
09:56:12 22 identified Jane Doe Number 1 by her first name.

09:56:15 23 Q. Okay. And that is indicated on there?

09:56:17 24 A. Yes, it is.

09:56:19 25 MR. DEVLIN: Okay. Judge, for purposes of this

09:56:20 1 hearing, because the real name of Jane Doe Number 1 is being
09:56:25 2 used in this document, I would move that it be sealed. The
09:56:28 3 defense has been provided a copy of the document, the original
09:56:32 4 copy. And so based on Section 3509, I would ask that this
09:56:37 5 document be sealed.

09:56:37 6 THE COURT: All right. Let me review the document.
09:56:39 7 The motion to seal will be granted, and the motion will be
09:56:43 8 sealed immediately following this hearing. Mr. Kissler, don't
09:56:48 9 seal it yet because it may come up again during the hearing.

09:56:53 10 Q. (BY MR. DEVLIN) Is there any other conversation that
09:56:55 11 ensued after he was advised of and waived his rights?

09:56:59 12 A. Not after that last picture shown to him.

09:57:01 13 Q. What happened after that?

09:57:03 14 A. Mr. Diehl invoked his right to have counsel present, and
09:57:06 15 the interview was immediately terminated at that time.

09:57:09 16 Q. All right. No further questioning ensued?

09:57:12 17 A. No, sir.

09:57:13 18 Q. All right. What happened after that?

09:57:14 19 A. We began to prepare Mr. Diehl to transport to the
09:57:20 20 Jacksonville Sheriff's Office. During that time, he was
09:57:23 21 standing alone with Special Agent McDonald for a period of
09:57:28 22 time. And then after that, he was placed in Special Agent
09:57:30 23 McDonald's vehicle, and Special Agent McDonald, myself, and
09:57:34 24 Mr. Diehl drove to the Jacksonville Sheriff's Office.

09:57:36 25 Q. Okay. After he invoked his right to a lawyer -- and it

09:57:39 1 was pretty clear to you that he had asked for a lawyer; is that
09:57:42 2 right?

09:57:42 3 A. That is correct.

09:57:43 4 Q. So you had ceased all interrogation, any questioning,
09:57:46 5 anything else?

09:57:47 6 A. That is correct.

09:57:48 7 Q. Did Mr. Diehl make any statements after that point to you
09:57:51 8 or to Agent McDonald or any other agent that you're aware of?

09:57:55 9 A. Yes, he did.

09:57:56 10 Q. All right. What did he say, and then I guess what were
09:58:00 11 the circumstances of his saying that?

09:58:03 12 A. During the vehicle transport, while he was being
09:58:06 13 transported to Jacksonville Sheriff's Office, he made various
09:58:11 14 statements regarding the embarrassment this might cause to his
09:58:13 15 son. He asked some questions as to the evidence and whether
09:58:17 16 due diligence was done.

09:58:19 17 And I advised Mr. Diehl several times that he had
09:58:21 18 already invoked his right -- his constitutional rights and we
09:58:25 19 were not going to speak to him any more about that. The only
09:58:27 20 answers that I would provide to him would be questions he might
09:58:30 21 have at processing as far as where he was going to be taken and
09:58:33 22 when he would see the magistrate judge for his initial
09:58:36 23 appearance.

09:58:36 24 Q. Okay. Did he make any other statements to Agent McDonald
09:58:41 25 along the lines of "I did not make any videos of child

09:58:44 1 pornography"? "Nudism isn't the same thing as child
09:58:47 2 pornography"? And asking, "Are you for Texas, because in Texas
09:58:51 3 they'll put you in jail for anything?" Did he make those
09:58:54 4 statements as well?

09:58:55 5 A. According to Special Agent McDonald's FD-302 report, yes,
09:58:59 6 he did.

09:58:59 7 MR. ORR: Objection. Hearsay, Your Honor.

09:59:00 8 MR. DEVLIN: Well, for purposes of this hearing,
09:59:03 9 Judge, the motion to suppress, hearsay is admissible.

09:59:05 10 THE COURT: It's overruled, but bear in mind that
09:59:08 11 nothing that's used in this hearing will be used in the trial.
09:59:10 12 If you want to elicit testimony similar to this, you need to
09:59:13 13 ask it anew at the trial, and Mr. Orr will be allowed to object
09:59:16 14 at that time.

09:59:17 15 MR. DEVLIN: Yes, sir. Absolutely.

09:59:19 16 Q. (BY MR. DEVLIN) But those statements were also made by
09:59:21 17 Mr. Diehl; is that correct?

09:59:22 18 A. Yes, it was.

09:59:23 19 Q. Were any of the statements that you've now mentioned that
09:59:25 20 were made by Mr. Diehl after he invoked his right to an
09:59:29 21 attorney made in any -- made in any way in response to any
09:59:32 22 question you or another law enforcement agent asked him?

09:59:35 23 A. No, sir.

09:59:36 24 Q. Did he -- did he make them in response to anything that
09:59:43 25 you might have been saying to somebody else or you might have

09:59:46 1 been talking to yourself or any other type of conversation that
09:59:51 2 might have been going on that didn't involve him?
09:59:55 3 A. No, sir.
09:59:55 4 Q. All right. So is it fair to say these statements were
09:59:58 5 spontaneous on his part?
09:59:59 6 A. Yes.
10:00:00 7 Q. Okay. Did you -- were you providing him with any
10:00:03 8 explanation of the procedures that he would then be going
10:00:07 9 through at that point? Anything like that?
10:00:10 10 A. Not until he asked directly.
10:00:12 11 Q. Okay. So none of this was in response -- you weren't
10:00:14 12 explaining procedures to him, and then he popped out with this
10:00:18 13 information?
10:00:18 14 A. Not that I recall.
10:00:22 15 Q. And even after he had started back and made some of these
10:00:25 16 statements, did you resume questioning at that point?
10:00:27 17 A. No, I did not.
10:00:28 18 Q. All right. So no questions were asked at any time at that
10:00:31 19 point; is that correct?
10:00:32 20 A. That is correct.
10:00:33 21 Q. All right. Were there any other statements -- and a
10:00:37 22 summary of these statements have been reduced to 302 summaries
10:00:41 23 by you and by Special Agent McDonald and provided to Mr. Orr;
10:00:46 24 is that correct?
10:00:47 25 A. That is correct.

10:00:49 1 Q. Okay. Any other statements made that day by Mr. Diehl of
10:00:53 2 any relevance?

10:00:54 3 A. No, sir.

10:01:00 4 MR. DEVLIN: Okay. A moment, Your Honor?

10:01:01 5 THE COURT: Yes.

10:01:18 6 Q. (BY MR. DEVLIN) I want to now move to October 25th of
10:01:21 7 2010, on that date, pursuant to a court order, there was what
10:01:27 8 I'll term a video review session that was attended by the
10:01:35 9 defendant, Mr. Diehl, by Mr. Orr, his attorney, by me, by
10:01:38 10 yourself, and by two other FBI agents, Special Agent
10:01:45 11 Jake Bailey and Special Agent Scott Jensen; is that correct?

10:01:48 12 A. That's correct.

10:01:49 13 Q. And that session occurred in this courthouse on the third
10:01:51 14 floor in the -- I guess it was in Judge Yeakel's jury room; is
10:01:55 15 that correct?

10:01:56 16 A. That is correct.

10:01:56 17 Q. All right. Can you describe what occurred during that
10:02:01 18 video review session?

10:02:03 19 A. During that session, Mr. Orr had asked us to explain what
10:02:08 20 videos we had and then also to -- on the court order, show them
10:02:12 21 to Mr. Diehl. We also brought some other physical evidence to
10:02:15 22 present at that time.

10:02:16 23 Q. I guess the best way to describe, the session was that it
10:02:19 24 was to follow up on a court order that Mr. Diehl be allowed to
10:02:23 25 review the child porn videos that we had in our possession

10:02:27 1 since we were not -- since by statute, we're not allowed to
10:02:31 2 give Mr. Orr or Mr. Diehl a copy of those, correct?
10:02:33 3 A. That is correct.
10:02:34 4 Q. And so this was intended to go through all the child porn
10:02:37 5 videos that have been charged in the ten-count second
10:02:41 6 superseding indictment; is that correct?
10:02:42 7 A. That's correct.
10:02:43 8 Q. And other evidence as well. There were some other
10:02:46 9 photographs, another video that did not depict child porn but
10:02:49 10 that we believe was associated with him; is that correct?
10:02:53 11 A. Yes. That's correct.
10:02:54 12 Q. Okay. Now, there was no other people present other than
10:02:58 13 the ones I just mentioned, correct?
10:02:59 14 A. That is correct.
10:03:00 15 Q. All right. Was -- and prior to that session, is it true
10:03:04 16 that I advised -- in Mr. Orr's presence, I advised Mr. Diehl
10:03:09 17 that basically this was a video review session. It was
10:03:13 18 designed simply to allow him to watch videos. Because of the
10:03:17 19 nature of the evidence, that's child pornography and
10:03:20 20 contraband, that they had -- that we or at least one of us,
10:03:23 21 being myself or one of the three agents, had to be in the room
10:03:26 22 at all times, correct?
10:03:28 23 A. That is correct.
10:03:29 24 Q. He was further advised that anything -- that this was not
10:03:33 25 going to be a questioning session. That anything he said,

10:03:35 1 though, would be noted down or could be noted down and used
10:03:39 2 against him; is that correct?
10:03:41 3 A. That is correct.
10:03:41 4 Q. And that if he wanted to have any conversations with his
10:03:44 5 lawyer, that he should save those conversations for another
10:03:49 6 time where he is meeting with Mr. Orr privately; is that right?
10:03:52 7 A. That is correct.
10:03:53 8 Q. And that none of his conversations were going to -- with
10:03:56 9 Mr. Orr were going to be protected if they were loud enough to
10:04:01 10 be heard by you or by myself; is that right?
10:04:02 11 A. That is correct.
10:04:03 12 Q. And the reason for that is twofold: One is you are
10:04:05 13 showing him contraband evidence; and then, secondly, he was
10:04:08 14 being essentially borrowed from the marshals as a person in
10:04:12 15 custody and you could not allow him to remain in that room
10:04:16 16 unsupervised without an agent close by; is that right?
10:04:20 17 A. That is correct.
10:04:21 18 Q. Okay. And he was provide with an opportunity before this
10:04:26 19 meeting and presumably after this meeting to meet with Mr. Orr
10:04:29 20 pursuant to whatever the marshal's guidelines were for having
10:04:32 21 an attorney-client meeting; is that right?
10:04:35 22 A. That's my understanding, yes.
10:04:36 23 Q. Okay. Did Mr. Diehl indicate that he understood this?
10:04:39 24 A. Yes, he did.
10:04:40 25 Q. All right. What happened?

10:04:43 1 A. Mr. Diehl -- Mr. Diehl was shown the videos, and there
10:04:48 2 were points during the video he made statements and then was
10:04:51 3 also questioning Mr. Devlin and myself regarding the contents
10:04:58 4 of the videos and the legality of the videos.

10:05:00 5 Q. Okay. So he was asking several questions; is that
10:05:04 6 correct?

10:05:04 7 A. That'S correct.

10:05:05 8 Q. And during that session, at least -- well, throughout that
10:05:07 9 session when Mr. Diehl asked a question, Mr. Orr, his attorney,
10:05:12 10 told him, Don't say anything, or words to that effect. Is that
10:05:15 11 true?

10:05:15 12 A. That is correct.

10:05:16 13 Q. But Mr. Diehl said that he insisted on saying something
10:05:20 14 and continued to ask a question; is that right?

10:05:23 15 A. That is correct.

10:05:24 16 Q. And at various points during this session, which the
10:05:27 17 session ended up lasting about two hours; is that right?

10:05:30 18 A. Approximately, yes.

10:05:31 19 Q. Throughout that entire two hours, Mr. Diehl was asking all
10:05:33 20 kinds of questions and making all kinds of statements; is that
10:05:37 21 correct?

10:05:37 22 A. That is correct.

10:05:38 23 Q. Were any of those in response to any questioning made by
10:05:42 24 either myself or by any of the FBI agents present?

10:05:45 25 A. No, they were not.

10:05:46 1 Q. And at various points when Mr. Diehl would ask a question,
10:05:50 2 it would often be directed to me as the prosecutor, correct?
10:05:52 3 A. That is correct.
10:05:53 4 Q. And on almost every occasion, I would ask Mr. Orr if it
10:06:00 5 was okay to answer. And Mr. Orr pretty much said it was okay
10:06:02 6 to answer, and then a statement would be made. Is that
10:06:05 7 correct?
10:06:05 8 A. That's correct.
10:06:06 9 Q. No questions would be asked of Mr. Diehl, though; is that
10:06:09 10 right?
10:06:09 11 A. That is right.
10:06:10 12 Q. Okay. I think there was one time that there was one
10:06:12 13 question asked by one of the agents, and I said: Mr. Diehl,
10:06:16 14 don't answer that. And then I asked the agent not to ask any
10:06:19 15 questions; is that correct?
10:06:20 16 A. That is correct.
10:06:21 17 Q. But other than that, it was all Mr. Diehl doing the
10:06:24 18 talking and addressing questions to me and Mr. Orr allowing me
10:06:28 19 to answer the questions?
10:06:28 20 A. That is correct.
10:06:29 21 Q. Okay. And that -- a summary of that session, if you will,
10:06:36 22 while not designed to be an interview, turned out to be a time
10:06:39 23 when Mr. Diehl made numerous statements that were noted down
10:06:43 24 and recorded by Special Agent Bailey; is that right?
10:06:48 25 A. Yes.

10:06:48 1 Q. Primarily?

10:06:49 2 A. Special Agent Bailey and Special Agent Jensen took notes.

10:06:52 3 Q. Okay. But you were present through that entire session

10:06:56 4 for the full two hours?

10:06:57 5 A. Yes, I was.

10:06:58 6 Q. And there was no breaks, at least, to have Mr. Diehl leave

10:07:00 7 and come back; is that right?

10:07:01 8 A. That is correct.

10:07:02 9 Q. And that has been summarized in a 302 that I've just

10:07:05 10 provided today to Mr. Orr; is that correct?

10:07:07 11 A. Yes, it is.

10:07:08 12 Q. Throughout that session, Mr. Diehl made numerous

10:07:14 13 statements indicating that he -- I'm just going to summarize

10:07:17 14 this -- that he knew the people in the video, that he was

10:07:21 15 asking -- is that correct?

10:07:23 16 A. Yes, it is.

10:07:24 17 Q. He was asking how someone could be identified if you

10:07:30 18 couldn't see their face.

10:07:31 19 A. That is correct.

10:07:32 20 Q. He was trying to talk about an injury or the deformity to

10:07:38 21 a hand in one or more of the videos and asking when that

10:07:42 22 occurred and how you can prove when that occurred or words to

10:07:46 23 that effect; is that right?

10:07:48 24 A. That is right.

10:07:48 25 Q. Okay. Basically he was asking how we were going to prove

10:07:59 1 our case, and I told him.

10:08:01 2 A. That is correct.

10:08:02 3 Q. Okay. And -- let's see. There was lastly a video that
10:08:12 4 has been provided to the defense that did not constitute child
10:08:15 5 porn that I will refer to as a home video that was provided to
10:08:18 6 you by the defendant's ex-wife, Kerry Jenkins; is that right?

10:08:22 7 A. That is correct.

10:08:23 8 Q. And during that video it shows various things, but it
10:08:28 9 shows Jane Doe Number 2 just around his house being
10:08:35 10 videotaped. At one point he was wondering who had filmed the
10:08:38 11 video; is that correct?

10:08:39 12 A. That is correct.

10:08:40 13 Q. And within seconds, there was a voice heard that was --
10:08:46 14 has been identified as Mr. Diehl. And in response to hearing
10:08:49 15 that, he spontaneously said, "Oh, I am," meaning I'm filming
10:08:54 16 it, basically. Is that correct?

10:08:55 17 A. That is correct.

10:08:56 18 Q. All right. And that's documented in your 302 summarizing
10:09:00 19 that; is that right?

10:09:01 20 A. Yes, it is.

10:09:02 21 Q. Okay. So none of those -- none of the statements that he
10:09:04 22 made during the October 25th session were made in response to
10:09:08 23 any question or interrogation by law enforcement is that right?

10:09:12 24 A. That is correct.

10:09:13 25 Q. In fact, he wasn't even advised of his rights there

10:09:16 1 because there was no intent or plan to ask him any questions.
10:09:18 2 He was simply there to watch videos; is that correct?
10:09:21 3 A. That is correct.
10:09:22 4 Q. Okay. And he had had one session prior to that probably a
10:09:26 5 month or two prior to that in the grand jury room on the third
10:09:30 6 floor of this courtroom where he was also shown a series of
10:09:33 7 videos but did not engage in any of the questioning and making
10:09:36 8 the statements that he did on October 25th; is that correct?
10:09:39 9 A. That's correct.
10:09:44 10 MR. DEVLIN: All right. I'll pass the witness.
10:09:45 11 THE COURT: Mr. Orr, cross-examination?
10:09:50 12 MR. ORR: Yes, Your Honor.
10:09:51 13 **CROSS-EXAMINATION**
10:09:51 14 **BY MR. ORR:**
10:09:51 15 Q. Agent Mullen, were either of these conversations that you
10:09:53 16 testified about, I think April 26th and October 25th of this
10:09:57 17 year, recorded?
10:09:58 18 A. No, they were not.
10:09:59 19 Q. Okay. So neither in the car nor on your original approach
10:10:04 20 to Mr. Diehl in Florida was there any tape recording made of
10:10:12 21 any kind?
10:10:12 22 A. That's correct.
10:10:12 23 Q. No memory card recording or anything along those lines?
10:10:16 24 A. Audio?
10:10:16 25 Q. Audio. Any kind of audio or --

10:10:18 1 A. No, there was not.

10:10:19 2 Q. -- any video recordings you made?

10:10:20 3 A. Video recordings? No.

10:10:22 4 Q. And no such recordings were made on October the 25th of

10:10:26 5 this year?

10:10:26 6 A. That's correct.

10:10:27 7 Q. All right. So far as the April 25th incident, Mr. Diehl,

10:10:35 8 according to your testimony, was warned of his rights under the

10:10:38 9 United States Constitution, correct?

10:10:39 10 A. That's correct. Are you referring to April 6th, 2010?

10:10:43 11 Q. Oh, April 6th. I'm sorry.

10:10:44 12 A. Yes. On April 6th.

10:10:44 13 Q. April 6th, right?

10:10:47 14 A. That's correct.

10:10:47 15 Q. And so far as those rights, those were first read to him

10:10:55 16 and then he was given a card; is that correct, sir?

10:10:58 17 A. No. He was provided a sheet of paper, the FD-395, Advice

10:11:00 18 of Rights.

10:11:01 19 Q. A sheet of paper. Okay. Anyway, in writing?

10:11:04 20 A. Uh-huh.

10:11:05 21 Q. Correct?

10:11:05 22 A. That's correct.

10:11:06 23 Q. And you had mentioned that -- that he asked for an

10:11:09 24 attorney?

10:11:09 25 A. That's correct.

10:11:10 1 Q. Okay. And was the point at which he asked for an
10:11:14 2 attorney, how many seconds after the written warning was signed
10:11:20 3 by him was that request made?

10:11:24 4 A. How many seconds after?

10:11:25 5 Q. Yeah. Do you know?

10:11:26 6 A. It was approximately 13 minutes after he waived his rights
10:11:30 7 that he asked for his attorney.

10:11:32 8 Q. Okay. You didn't -- did he even -- did he first ask about
10:11:35 9 lawyer or say, Should I get a lawyer? Did he say -- when was
10:11:39 10 the first time the lawyer word got mentioned?

10:11:41 11 A. When I read his Advice of Rights to him.

10:11:44 12 Q. And after that when was it mentioned next?

10:11:47 13 A. When he asked for his attorney.

10:11:48 14 Q. When he asked for an attorney, not -- and that's the 13
10:11:53 15 minutes later time?

10:11:57 16 A. That's correct.

10:11:58 17 Q. Okay. So far as the questions you asked Mr. Diehl, you
10:12:04 18 had these questions -- I presume you had some exhibits with you
10:12:07 19 and questions prepared, did you not, sir?

10:12:09 20 A. Yes, I did?

10:12:10 21 Q. And you -- you intended to ask him some questions when you
10:12:14 22 first approached him, did you not, sir?

10:12:16 23 A. Yes, I did.

10:12:17 24 Q. Okay. And you as an FBI agent have approached many people
10:12:21 25 and asked many people questions, have you not, sir?

10:12:24 1 A. That's correct.

10:12:24 2 Q. And you understand that when you first show up on

10:12:27 3 somebody's doorstep or on the -- grab them -- however you

10:12:30 4 grabbed them, they're frequently startled, are they not, sir?

10:12:36 5 A. Some are, yes.

10:12:37 6 Q. It's a bit of a shock when the FBI shows up and it's not

10:12:40 7 just a friendly visit. You're there to arrest somebody?

10:12:44 8 A. Yes.

10:12:44 9 Q. Okay. People react in different ways, do they not, sir?

10:12:47 10 A. Some do, yes. They all act a little different.

10:12:50 11 Q. Okay. And so far as how Mr. Diehl acted, did he seem to

10:12:54 12 be shocked and surprised?

10:12:55 13 A. Yes, he did.

10:12:56 14 Q. Okay. And did he inquire of the sort of the usual

10:13:01 15 question I guess people frequently ask: What's this all about?

10:13:04 16 A. Yes, he did.

10:13:05 17 Q. And what did you tell him?

10:13:06 18 A. I advised him that he's being arrested on a complaint out

10:13:09 19 of the Western District of Texas for the production of child

10:13:12 20 pornography.

10:13:13 21 Q. Okay. Did he ask you some more questions?

10:13:15 22 A. He asked what this was all about, and I advised him we'll

10:13:18 23 get to that point.

10:13:19 24 Q. Okay. And is that when you started showing him these

10:13:23 25 items that have be admitted into evidence for this hearing?

10:13:26 1 A. No. Before showing those items, I showed him his Advice
10:13:30 2 of Rights and he read him his Advice of Rights and he signed
10:13:33 3 this.

10:13:34 4 Q. And then after that he asked, What's this all about? And
10:13:36 5 then you gave him his rights, and then you -- in response to
10:13:41 6 his question about, What's this all about? did you begin
10:13:44 7 showing him these exhibits?

10:13:45 8 A. Not until we had moved into the vehicle --

10:13:48 9 Q. Okay.

10:13:48 10 A. -- and I advised him of his rights.

10:13:50 11 Q. Was it daylight?

10:13:52 12 A. Yes, it was.

10:13:53 13 Q. Okay. And so where did you seat him in the vehicle? Seat
10:13:55 14 him.

10:13:55 15 A. Seat him?

10:13:56 16 Q. Seat him.

10:13:57 17 A. In the back seat behind in the back passenger seat.

10:14:01 18 Q. Okay. And was he handcuffed?

10:14:03 19 A. He was handcuffed.

10:14:04 20 Q. Were his handcuffs behind him?

10:14:06 21 A. Initially they were. But we moved them to the front when
10:14:08 22 we sat him down.

10:14:09 23 Q. And why did you do that?

10:14:10 24 A. For comfort.

10:14:11 25 Q. And so you have testified you showed him these various

10:14:14 1 exhibits, correct, sir?

10:14:15 2 A. That's correct.

10:14:16 3 Q. And were they handed to him so that he could hold them in
10:14:21 4 his hands?

10:14:22 5 A. I believe I showed them to him --

10:14:23 6 Q. Okay.

10:14:24 7 A. -- from where I was sitting.

10:14:25 8 Q. Were you sitting in the front seat or the back seat?

10:14:27 9 A. I was sitting in the back seat next to him.

10:14:30 10 Q. And so the notes that have been scribbled on these --

10:14:35 11 well, I don't mean to insult you. But the notes that have been
10:14:39 12 placed on these exhibits, when they were put on there?

10:14:41 13 A. At the moment he told me the answer.

10:14:43 14 Q. Okay. Did you have something there to write on, like a --

10:14:46 15 A. Yes.

10:14:46 16 Q. -- clipboard?

10:14:47 17 A. Yes. I had a notepad.

10:14:49 18 Q. All right. So far as what he told you -- if I understand
10:14:55 19 it, so far as the photographs of the hand, he indicated that
10:14:58 20 that, if I could hear your testimony, was not his hand --
10:15:02 21 didn't look like his hand?

10:15:04 22 A. That's correct.

10:15:04 23 Q. Did he admit that any of the photographs could be of his
10:15:07 24 hand?

10:15:08 25 A. No. He said it could be, but he never said it was, no.

10:15:11 1 Q. Okay. And, basically, did he not admit -- he did deny
10:15:17 2 that that was his hand?

10:15:19 3 A. Yes.

10:15:19 4 Q. Okay. Insofar as the photographs of the girl in the
10:15:25 5 photographs there, what exactly did he tell you about that?

10:15:29 6 A. He provided me her first name.

10:15:32 7 Q. Okay.

10:15:32 8 A. And that he knew her -- he knew her by her first name.

10:15:36 9 Q. Okay. And did you know that he knew this young lady?

10:15:39 10 A. I thought he might know her, yes.

10:15:41 11 Q. Okay. Did he tell you how he might know her?

10:15:44 12 A. No. We didn't get to that, because that's when he shortly
10:15:47 13 thereafter asked for an attorney.

10:15:49 14 Q. Okay. And do you remember the question that prompted him
10:15:51 15 to ask for an attorney?

10:15:53 16 A. I asked him what her last name was.

10:15:56 17 Q. And then what were his exact words, if you recall?

10:15:59 18 A. If I recall, he started saying that he knew what this was
10:16:03 19 all about and that he wanted his attorney.

10:16:06 20 Q. But you don't recall that those are in fact his exact
10:16:09 21 words, or do you?

10:16:09 22 A. The words were about: Wait a minute. I know what this is
10:16:14 23 all about. Yes, those were his exact words at the time.

10:16:17 24 Q. Well, you had told him that he was being arrested on
10:16:20 25 charges -- federal charges of child pornography from Texas,

10:16:24 1 correct?

10:16:24 2 A. That's correct.

10:16:24 3 Q. And he made some comment about Texas?

10:16:27 4 A. Not in my presence initially, no.

10:16:29 5 Q. But in, what, Agent McDonald's presence?

10:16:32 6 A. Yes. According to his report.

10:16:34 7 Q. And what was his comment?

10:16:35 8 A. I don't have his FD-302 in front of me, so I don't know

10:16:42 9 exactly what it was.

10:16:43 10 Q. Is there any other comments that he made that you haven't

10:16:46 11 testified about so far this morning in the April 6th hearing or

10:16:50 12 meeting?

10:16:50 13 A. Not that I'm aware of. It would be documented in the

10:16:54 14 FD-302s.

10:16:57 15 Q. Okay. So far as the October 25th meeting, there was no

10:17:02 16 warning of rights, correct?

10:17:04 17 A. That is correct.

10:17:05 18 Q. Okay. And there was no -- no questioning by the FBI,

10:17:09 19 according to what you're saying here, correct, sir?

10:17:12 20 A. Except for the one Special Agent Bailey asked that

10:17:14 21 Mr. Devlin --

10:17:14 22 Q. Do you remember what that question was?

10:17:16 23 A. I do not recall what that was.

10:17:18 24 Q. Now, you mentioned in your reports, your 302 that I've

10:17:25 25 just been handed this morning, that a video was shown to

10:17:33 1 Mr. Diehl and that so far as -- of a John Doe and that

10:17:41 2 Mr. Diehl identified him as a boy, correct?

10:17:44 3 A. That's correct.

10:17:45 4 Q. Even though at the point that he identified it as a boy,
10:17:48 5 that not enough of the video had been shown that you could tell
10:17:52 6 it was boy, correct?

10:17:53 7 A. Yes. In my opinion, not enough had been shown.

10:17:56 8 Q. So you do understand that discovery had been given to
10:17:59 9 Mr. Diehl's attorney weeks, if not months, in advance of this
10:18:03 10 October 25th meeting?

10:18:04 11 A. That's correct, yes.

10:18:05 12 Q. Okay. And you know that the attorney was told; that is,
10:18:09 13 me, was told that this video at the house in the bathtub
10:18:12 14 depicted a girl and a boy?

10:18:14 15 A. I don't know that for sure. I wasn't privy to those
10:18:18 16 conversations.

10:18:20 17 Q. Okay. All right. You don't know that for sure, but that
10:18:24 18 would be something that might have been told by Mr. Devlin to
10:18:27 19 me?

10:18:28 20 A. I couldn't speak on what Mr. Devlin had spoke to you
10:18:31 21 about. I don't know.

10:18:32 22 Q. And one of the purposes of getting discovery is so the
10:18:36 23 defense attorney can explain things to his counsel -- or to his
10:18:40 24 client, correct?

10:18:41 25 A. Yes.

10:18:41 1 Q. You want to be able to tell the citizen accused what the
10:18:45 2 government has against him, correct?

10:18:47 3 A. Correct.

10:18:47 4 Q. So there are two interpretations for this so far as the
10:18:56 5 child in the bathtub being a boy by Mr. Diehl: One
10:18:59 6 interpretation is that he knew it was a boy because he was
10:19:03 7 present when the video was made or because his lawyer told
10:19:05 8 him. Correct?

10:19:07 9 A. I don't make interpretations of it. I was just stating
10:19:12 10 what he said.

10:19:13 11 Q. All right. And speaking of the boy in the tub, have any
10:19:18 12 forensic interviews been had with that young man?

10:19:22 13 A. I believe there was one.

10:19:24 14 Q. Okay. Were there any forensic interviews of any other
10:19:28 15 witnesses in this case?

10:19:29 16 A. Yes, there was.

10:19:30 17 Q. And what were those? Do you remember?

10:19:32 18 A. They were done by the child advocacy centers in the
10:19:36 19 respective cities in which the alleged victims reside in.

10:19:41 20 MR. ORR: Okay. May I have just a moment,
10:19:45 21 Your Honor?

10:19:54 22 I pass the witness, Your Honor.

10:19:55 23 THE COURT: Mr. Devlin, any redirect?

10:19:58 24 MR. DEVLIN: Yes, Your Honor.

10:20:01 25 *****

REDIRECT EXAMINATION

BY MR. DEVLIN:

Q. Agent Mullen, what was your understanding in April -- on April 6th of Mr. Diehl's employment or educational background?

A. He was employed as a computer programmer at the time.

Q. Okay. Was there anything about his demeanor that indicated to you that he did not understand his rights when you read them to him?

A. No.

Q. Did he understand English well?

A. Yes, he did.

Q. Did he ask any questions after you had read him his rights about the rights?

A. No.

Q. Okay. Was there any question in your mind that he understood his rights?

A. No. In my mind he understood them.

Q. Okay. And the form that you read, the FD-395, that's the standard rights advisement form for the Federal Bureau of Investigation; is that correct?

A. That is correct.

MR. DEVLIN: Pass the witness, Your Honor.

THE COURT: Mr. Orr?

MR. ORR: No further questions, Your Honor.

THE COURT: You may step down.

10:21:01 1 Mr. Devlin, any further evidence?

10:21:03 2 MR. DEVLIN: No further evidence on this motion,
10:21:05 3 Your Honor.

10:21:06 4 THE COURT: Mr. Orr do you have any evidence to
10:21:08 5 present?

10:21:08 6 MR. ORR: No, Your Honor.

10:21:09 7 THE COURT: All right. Then I'll hear your argument.

10:21:15 8 MR. DEVLIN: Your Honor, I think it's a simple
10:21:16 9 resolution of this case. All of the statements made by the
10:21:19 10 defendant after he was arrested were made in response to proper
10:21:25 11 Miranda warnings. The defendant understood them. The Miranda
10:21:28 12 warnings were proper under the law.

10:21:30 13 He spoke for about 13 minutes and gave various
10:21:33 14 statements. We've only done a very brief overview of those,
10:21:36 15 but he gave more statements. After about 13 minutes, he
10:21:41 16 invoked his right to counsel. It was clear to the agents that
10:21:43 17 he did that. The interrogation stopped at that point.

10:21:46 18 After that he made some statements spontaneously, not
10:21:52 19 in response to any interrogation or other activity by the
10:21:55 20 agents that would have been intended to elicit a response.
10:21:59 21 And, again, while those responses may not have -- may not seem
10:22:04 22 incriminating, nevertheless we're presenting them to the Court
10:22:09 23 as statements that were made by him voluntarily after he had
10:22:13 24 invoked his counsel and after the agents had scrupulously
10:22:16 25 honored his invocation of counsel.

10:22:19 1 On the 25th of October, there was no Miranda warning
10:22:22 2 at that point because there was no interrogation. All the
10:22:25 3 statements made by Mr. Diehl were made after he was well
10:22:30 4 advised that he shouldn't be making any statements. His
10:22:33 5 counsel told him not to say anything, and he insisted on doing
10:22:37 6 that. The agents were there to simply listen and record what
10:22:40 7 he said. All the questioning was done by Mr. Diehl, and
10:22:44 8 responses made by me or any of the agents were done after --
10:22:48 9 pretty much after asking Mr. Orr if there was any problem.
10:22:52 10 There was no objection lodged by Mr. Orr or Mr. Diehl to any
10:22:55 11 responses that were made, and none of them were intended to
10:22:59 12 elicit any further response.

10:23:01 13 I believe all the statements are admissible for
10:23:04 14 compliance with Miranda, the ones from April 6th. And
10:23:07 15 October 25th the statements were completely voluntary and, in
10:23:11 16 fact, insisted upon by Mr. Diehl even after he was advised time
10:23:15 17 and time again to keep his mouth shut.

10:23:17 18 So we would ask that all statements be deemed
10:23:21 19 admissible. Whether we admit them or not of course is going to
10:23:24 20 be up to us. But there's been no constitutional violation.
10:23:28 21 The defendant, as indicated, was a computer programmer. He's
10:23:31 22 an intelligent man, understood his rights, didn't have any
10:23:34 23 problems according to Agent Mullen. And so we have a valid
10:23:38 24 Miranda waiver. The statements are admissible, and we ask that
10:23:43 25 the motion be denied.

10:23:44 1 THE COURT: Mr. Orr?

10:23:44 2 MR. ORR: The government has not carried its burden,
10:23:47 3 Your Honor, to show that the waiver of rights was knowingly and
10:23:50 4 voluntarily made on April 6th. And the other April 25th *[sic]*
10:23:54 5 hearing, Your Honor, it should not -- those -- any comments by
10:23:58 6 Mr. Diehl should be prohibited. They are just comments made in
10:24:01 7 the course of getting discovery. He has a right to see the
10:24:04 8 videos and seek information, and those kind of comments should
10:24:08 9 not be allowed. It would impinge upon the defendant's right to
10:24:11 10 seek discovery and his right to due process under the law.

10:24:14 11 THE COURT: I find after listening to the evidence
10:24:17 12 and hearing argument that the government has satisfied its
10:24:21 13 burden and carried its burden showing that the statements that
10:24:25 14 were made at or around the time of the arrest were given at
10:24:29 15 least during the first about 13 minutes after the defendant had
10:24:33 16 been properly given his Miranda warnings and that any
10:24:37 17 statements thereafter were voluntary.

10:24:40 18 And with regard to October the 25th, I further find
10:24:44 19 based on the evidence in front of me that all statements were
10:24:47 20 voluntary. Therefore, the motion to suppress is denied.

10:24:53 21 MR. ORR: Your Honor, one more thing I'd like to get
10:24:55 22 on the record. The government has -- apparently does not have
10:24:59 23 yet these forensic interviews, and I have actually requested
10:25:03 24 them, I think, over the time I've been on the case a few times
10:25:05 25 by E-mail. And Mr. Devlin informed me I'll be allowed to see

10:25:13 1 those, and I would like to see those well in advance of trial.

10:25:16 2 I prefer to have copies of them.

10:25:18 3 THE COURT: Well, Mr. Devlin, let me hear from you,
10:25:20 4 and let's work this out now.

10:25:22 5 MR. DEVLIN: There is absolutely no question --

10:25:22 6 THE COURT: Because once I release y'all for the
10:25:24 7 holidays, we will come back on January the 11th and select a
10:25:28 8 jury. So we won't be back again probably before that.

10:25:32 9 MR. DEVLIN: Yes, sir. No. This -- I have given
10:25:36 10 Mr. Orr all kinds of discovery. But I have represented to him
10:25:40 11 carefully, because of the amount of evidence in this case and
10:25:43 12 other things, that I honestly can't represent to him that I
10:25:46 13 have given him every single thing out there. And I have
10:25:50 14 regularly and frequently encouraged him to contact
10:25:52 15 Agent Mullen, the case agent, if there is any discovery that he
10:25:57 16 wishes to take a look at that might be in Agent Mullen's
10:26:01 17 possession. Agent Mullen has it all.

10:26:03 18 I know that he's probably trying to keep track of
10:26:05 19 what he's given me and what he hasn't. But it's all been out
10:26:08 20 there and available for Mr. Orr to inspect. So this is not a
10:26:10 21 discovery problem, Judge. We've had no problems at all. I
10:26:13 22 never said he can't look at anything. He can look at
10:26:16 23 everything he wants to at any time he wants to. So that's
10:26:20 24 fine.

10:26:20 25 THE COURT: Mr. Orr.

10:26:20 1 MR. ORR: Well, then I misunderstood, because I've
10:26:22 2 made several requests for them. It's a failure to communicate,
10:26:28 3 I suppose.

10:26:29 4 THE COURT: Agent Mullen is here. Mr. Devlin is
10:26:31 5 here. You're here. So before y'all leave the courthouse
10:26:35 6 today, you have a conversation to where both sides understand
10:26:39 7 what's out there and what you have been provided. This is your
10:26:43 8 chance to ask for anything else you might want to ask about.
10:26:47 9 And if you're not satisfied with the result of that
10:26:51 10 conversation, get something on file right away.

10:26:54 11 MR. ORR: Yes, sir.

10:26:54 12 THE COURT: I don't want there to be any pending
10:26:57 13 nagging doubts about your not being provided with discovery
10:27:00 14 when we get back here to start selecting a jury.

10:27:03 15 MR. ORR: No, Your Honor. I intend to work over the
10:27:05 16 holidays on this. And does that really mean I can't nag
10:27:10 17 Your Honor and/or Mr. Devlin about this case?

10:27:12 18 THE COURT: Well, I request and you-all do what you
10:27:14 19 will do. I understand. I understand. I was not directing
10:27:20 20 "nagging" to me. I was referring to "nagging doubts" about
10:27:23 21 whether you have been provided --

10:27:24 22 MR. ORR: Well, I'm a little sensitive about that
10:27:26 23 word, Your Honor.

10:27:27 24 THE COURT: Let me ask you-all something. I failed
10:27:29 25 to mention it sooner. Since I don't anticipate, because we've

10:27:33 1 been over everything today, including the amount of time you
10:27:36 2 need for opening statements and what have you, that we'll need
10:27:40 3 to get together in advance of the voir dire on the 11th. I
10:27:46 4 didn't ask you-all about whether any side has -- either side
10:27:50 5 has objection to note taking by jurors in this case.

10:27:54 6 MR. DEVLIN: I don't have any objection, Your Honor.

10:27:55 7 MR. ORR: I don't -- I don't have any objection,
10:27:57 8 Your Honor.

10:27:57 9 THE COURT: All right. Well, it's generally easier
10:27:59 10 for the jurors. And if this case is going to last four days, I
10:28:02 11 think probably it would be better for them. So the jurors will
10:28:07 12 be allowed to take notes. I will give them the admonishment
10:28:11 13 about note taking and not placing undue reliance on notes by
10:28:14 14 other jurors and what have you, as I always do.

10:28:17 15 All right. I will make a decision and will let you
10:28:23 16 know the morning of trial whether we will take additional
10:28:27 17 alternates. Otherwise, you can count on the fact there will be
10:28:31 18 two alternates. I'll just make a decision after I've thought
10:28:35 19 about this about whether we'll take any more alternates.

10:28:38 20 Anything else we need to take up before trial?

10:28:44 21 MR. ORR: No, Your Honor.

10:28:45 22 MR. DEVLIN: Not from the government, Your Honor.

10:28:46 23 THE COURT: All right. Then very good. I appreciate
10:28:48 24 the fact that y'all are working together in getting this case
10:28:53 25 organized for trial. You are the number one case on

10:28:56 1 January 11th, so you will go to trial. So you can plan on
10:29:03 2 starting your jury selection promptly at 9 o'clock.

10:29:07 3 To remind you of the way we handle things here, I
10:29:12 4 will ask my questions, you will each be given your 20 minutes,
10:29:16 5 and then what will happen is I'll call you to the bench and ask
10:29:22 6 you if there are any jurors you would like held back because
10:29:26 7 you might want an additional question or you think you might
10:29:30 8 have a challenge for cause of a particular juror. Then we will
10:29:35 9 release every other juror from the panel for their recess and
10:29:42 10 then bring any that we've retained up to the bench one at a
10:29:46 11 time and then let them go. I will then rule on the challenges
10:29:50 12 for cause after all of the prospective jurors are out of the
10:29:53 13 room, and we will look at the list and determine where your
10:29:58 14 strike range falls.

10:29:59 15 Now, one of the things I do that you both know, but
10:30:04 16 I'll remind you of it, I will be keeping track during the
10:30:09 17 voir dire process of responses from jurors that indicate to me
10:30:12 18 that we may have a juror that does not have a legal reason to
10:30:16 19 be exempted from jury service but just doesn't want to be on
10:30:20 20 the jury.

10:30:25 21 My experience in private practice was that if
10:30:27 22 somebody really didn't want to be on the jury, they did not
10:30:31 23 make a good juror and they always blamed their service on one
10:30:34 24 side or the other and you never knew who they were going to
10:30:37 25 blame it on. So I encourage you to keep little notes of that,

10:30:40 1 too, because, again, while the panel is out of the room, I will
10:30:45 2 go over those jurors that I have highlighted with you and we'll
10:30:49 3 hear from you on any you have. And if you both agree -- it
10:30:55 4 takes both sides to agree. We're not going to argue or
10:30:57 5 anything of that nature. I will just mention the name of the
10:31:01 6 juror. If you both agree you don't want that juror, then that
10:31:04 7 juror will not be in your strike range. But you both have to
10:31:07 8 agree. If either side says, no, we want to retain that juror
10:31:11 9 then you have to make a decision on what to do with your
10:31:16 10 peremptory challenges.

10:31:16 11 But if we have jurors who really just don't want to
10:31:20 12 serve, they might be bad jurors and you agree to that, I will
10:31:24 13 go ahead and mark them off. They will not know they've been
10:31:29 14 excluded. They will still come back in and sit, and we will
10:31:31 15 announce the jurors after you strike your list. But bear that
10:31:35 16 in mind. It takes both of you to agree, and it won't be
10:31:40 17 debated. If one side or the other says, no, retain the juror,
10:31:43 18 we will.

10:31:44 19 We will take the noon break after we seat the jury
10:31:49 20 regardless of how early or late that comes because, generally,
10:31:53 21 the jurors have been here for a long time and it's a new
10:31:56 22 experience to them. They're going to be tired after we do the
10:32:00 23 selection. So if jury selection goes fast, we may take an
10:32:04 24 early lunch. If jury selection goes slowly, we will take a
10:32:08 25 late lunch. But in order that you may plan as soon, as we have

10:32:12 1 the jurors impaneled and sworn and I've given them their
10:32:17 2 preliminary instructions, we will recess for lunch.

10:32:20 3 When we return, I will give whatever other
10:32:24 4 instructions that I mean to give, the indictment will be read,
10:32:29 5 the defendant will enter a plea, and then you may begin with
10:32:34 6 your opening statements and go right into the -- to the
10:32:39 7 evidence.

10:32:41 8 Then our work will basically be, tempting though it
10:32:47 9 is to come early and stay late, I'm always reminded by what
10:32:53 10 Judge Nowlin said looking at the way Judge Bunton ran his
10:32:57 11 courtroom, that it looked like a good idea until he realized he
10:33:00 12 had to be there, too, and then it wasn't as much fun as it
10:33:05 13 sounded to get here at 7 o'clock in the morning and go 'til
10:33:08 14 8 o'clock at night.

10:33:10 15 Really why I don't do that is out of consideration
10:33:13 16 for the jurors and the fact that staff doesn't get paid
10:33:16 17 overtime for that. Y'all are getting paid, and I'm appointed
10:33:19 18 forever. So I don't care, but I don't like to cause the staff
10:33:22 19 to be away from their families any more than they have to.

10:33:26 20 So generally our working hours: We will start at
10:33:29 21 9:00 in the morning. We will take a mid-morning recess
10:33:33 22 somewhere around 10:30 where there's a convenient stopping
10:33:37 23 point in the evidence. We will take a noon recess somewhere
10:33:40 24 around noon when there's a convenient stopping point in the
10:33:43 25 evidence.

10:33:47 1 We will either be back at 1:30 or 2:00. I will make
10:33:51 2 that announcement on a day-to-day basis during the trial. And
10:33:53 3 that will depend on if I don't have other matters that I have
10:33:56 4 to deal with over the noon hour, we'll come back from the noon
10:34:00 5 recess at 1:30. If I do, we'll come back at 2:00, because,
10:34:04 6 amazingly, my other cases keep going on while I'm out here in
10:34:08 7 the courtroom trying a case. But that -- that will be
10:34:12 8 announced each day.

10:34:15 9 Then in the afternoon, we'll take a break sometime
10:34:18 10 mid-afternoon, 3:30 or so, wherever there's a convenient
10:34:23 11 stopping point in the evidence. And we will recess as close to
10:34:28 12 5:00 as there is a convenient stopping point in the evidence.

10:34:30 13 Again, part of the reason for starting at 9:00 and
10:34:34 14 recessing at 5:00 is we draw jurors from 24 counties. They can
10:34:42 15 go as far west as Gillespie County, which is Fredericksburg, as
10:34:47 16 far east as Burleson County, which is Caldwell. And some of
10:34:52 17 those jurors have long distances to drive in the growing
10:34:57 18 traffic. And I have had, although most of your jurors as you
10:35:01 19 know will come from Travis and Williamson counties, because
10:35:05 20 they're the biggest counties in the district, I have had jury
10:35:08 21 trials where we've had the bookends, where I've had one from
10:35:13 22 Fredericksburg and one from Caldwell.

10:35:15 23 The government will allow them, if they're outside a
10:35:17 24 certain mileage radius to opt for a hotel room and stay. That
10:35:22 25 generally doesn't work very well because the jurors we get from

10:35:25 1 those counties are generally farmers and ranchers, and they
10:35:29 2 have to take care of their livestock. And so that really -- it
10:35:33 3 sounds good, but it really doesn't do them that big of a
10:35:36 4 favor. And most of the jurors I've found make the drive in.
10:35:39 5 So that gives you an idea of what to expect.

10:35:42 6 Again, any further question? Mr. Devlin, anything on
10:35:45 7 your mind?

10:35:45 8 MR. DEVLIN: No, Your Honor.

10:35:46 9 THE COURT: Mr. Orr, anything on your mind?

10:35:48 10 MR. ORR: No, Your Honor. I'm just very happy that
10:35:50 11 you follow Judge Nowlin's model as opposed to Judge Bunton's
10:35:55 12 model.

10:35:56 13 THE COURT: Well, I remember -- you and I are old
10:35:58 14 enough to have tried cases in front of Judge Bunton, and we've
10:35:59 15 been on the receiving --

10:35:59 16 MR. ORR: I've tried some cases in front of
10:36:01 17 Judge Button and I actually harken back to days of
10:36:04 18 Judge Roberts who frequently didn't start 'til 9:30.

10:36:06 19 THE COURT: There was a contrast there between
10:36:08 20 Judge Bunton and Judge Roberts. And when he started at
10:36:11 21 9 o'clock, that meant you started and you had to be here at
10:36:16 22 9 o'clock, but he might come at 10:00. And woe be the lawyer
10:36:20 23 who ever mentioned to Judge Roberts that me might allow you to
10:36:24 24 stay away until 10:00, too. That did not go over very well.

10:36:28 25 MR. ORR: I never had the nerve to say anything to

10:36:30 1 Judge Roberts.

10:36:31 2 THE COURT: Well, you had the nerve to say a thing to

10:36:34 3 Judge Roberts. It was Judge Patsy that you didn't have the

10:36:38 4 nerve to say anything to. We all did with her.

10:36:40 5 Well, very good. We're in recess until 9 o'clock

10:36:44 6 Tuesday morning, the 11th. Everyone have a Merry Christmas and

10:36:47 7 I will see you back here in January. Court's in recess.

10:36:51 8 (End of transcript)

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1 **UNITED STATES DISTRICT COURT)**

2 **WESTERN DISTRICT OF TEXAS)**

3 I, Arlinda Rodriguez, Official Court Reporter, United
4 States District Court, Western District of Texas, do certify
5 that the foregoing is a correct transcript from the record of
6 proceedings in the above-entitled matter.

7 I certify that the transcript fees and format comply with
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10 WITNESS MY OFFICIAL HAND this the 9th day of January 2012.

11

12 /S/ Arlinda Rodriguez
13 Arlinda Rodriguez, Texas CSR 7753
14 Expiration Date: 12/31/2012
15 Official Court Reporter
16 United States District Court
17 Austin Division
18 200 West 8th Street, 2nd Floor
19 Austin, Texas 78701
20 (512) 916-5143

21

22

23

24

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ARLINDA L. RODRIGUEZ, OFFICIAL COURT REPORTER
U.S. DISTRICT COURT, WESTERN DISTRICT OF TEXAS (AUSTIN)